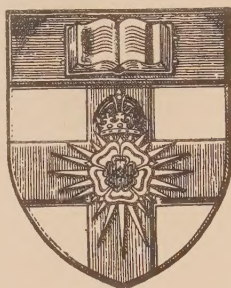


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FOR ENGLAND AND WALES



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AND BY THE

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PIGOTT v. PIGOTT.

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Husband and Wife—Maintenance—High Court—Periodical payments—Power to secure for joint lives only—Wilful neglect to maintain—Matrimonial Causes Act, 1950 (14 Geo. 6, c. 25), s. 23 (1) (2).

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Hodson,
Morris and
Sellers L.JJ.

On a wife's application for an order for periodical payments and for the securing of those payments under section 23 of the Matrimonial Causes Act, 1950,¹ the security cannot be ordered

¹ Matrimonial Causes Act, 1950, s. 23: "(1) Where a husband has "been guilty of wilful neglect to "provide reasonable maintenance for "his wife or the infant children of "the marriage, the court, if it would "have jurisdiction to entertain proceedings by the wife for judicial separation, may, on the application "of the wife, order the husband to "make to her such periodical payments as may be just; and the "order may be enforced in the same "manner as an order for alimony in

"proceedings for judicial separation.

"(2) Where the court makes an "order under this section for periodical payments it may, if it thinks "fit, order that the husband shall, to "the satisfaction of the court, secure "to the wife the periodical payments, "and for that purpose may direct that "a proper deed or instrument to be "executed by all necessary parties "shall be settled and approved by "one of the conveyancing counsel of "the court."

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under subsection (2) of that section for any period exceeding the joint lives of the husband and wife.

Tangye v. Tangye [1914] P. 201; 30 T.L.R. 649 and dictum of Hodson J. in *Scott v. Scott* [1951] P. 245, 248; [1951] 1 All E.R. 216 applied.

Dictum of Denning L.J. in *King v. King* [1954] P. 55, 63; [1953] 2 All E.R. 1029 and *Bradley v. Bradley* [1956] P. 326; [1956] 1 All E.R. 543 not followed.

APPEAL from Mr. Commissioner Grazebrook Q.C.

The parties were married in 1935 and lived for several years at Sheffield in a house purchased by the wife's father as a wedding present. Two daughters were born of the marriage. During the war the wife and the children sought safety in Ireland with the wife's parents, with the consent of the husband. The wife was willing to return home at all times but the husband refused to receive her back unless she brought the children with her, which she was unwilling to do. In 1945 the husband filed a petition for divorce on the ground of the wife's alleged desertion. That petition was dismissed by Hodson J. on June 5, 1945. Immediately afterwards the wife sent a letter to her husband offering to return to him with the children. The husband sent no reply to that letter and until 1955 the wife was unable to ascertain the husband's address and received from him no provision for the maintenance of herself and the children. In August, 1955, having ascertained the address of the husband from a notice in the Press of the death of the husband's father, the wife issued a summons in the present action, claiming provision from her husband under section 23 (1) and (2) of the Matrimonial Causes Act, 1950, on the ground of wilful neglect to maintain. A few days before the date fixed for the hearing of the wife's action the husband filed another petition for divorce on the ground of desertion by the wife from April 7, 1948. In that petition he asked for the court's discretion because he had been living with a woman on a permanent basis from 1947, and there had been children born of his mistress. On October 5, 1956, Karminski J. expressed the opinion that the letter written by the wife in 1945, offering to return, was genuine, and he dismissed the petition as "hopeless."

The wife's claim, having been postponed pending the decision of the divorce petition, was heard by Mr. Commissioner Grazebrook on March 8, 1957, and he awarded the wife maintenance of £200 per annum, less tax, as from the date of the order.

The wife now appealed, contending that the maintenance payment was inadequate and should be increased; that the payments should date back to the date of the issue of the summons and continue and be secured during her life.

It appeared that in 1955 the husband had become entitled to £12,000 or more on the death of his father, but his capital was now worth only about £5,000 (after deduction of a bank overdraft of £4,000 or £5,000), and in addition he owned house property which he expected to yield him a net income of about £300 a year. He earned £870 a year as an engineer, and his total gross income (including the annual value of his house at £130 a year) was about £1,300 a year. The wife had an income of about £116 from house property and from a trust. She also had a house where she lived, where (she said) she was kept by her sister who shared it with her and one daughter.

The Court of Appeal increased the wife's maintenance to £300 during the joint lives of the parties, and antedated it from the date of the issue of the summons in the action. The case is reported solely on the issue of security.

Harold Brown Q.C. and *Derek Hyamson* for the wife. *Willmer J.* in *Bradley v. Bradley*,² following the decision of *Karminski J.* in *McLellan v. McLellan*,³ held that a wife was entitled to secured periodical maintenance payments during her life. *Denning L.J.* in *King v. King*⁴ also held that the court had power to make such an order. It is true that the point had not been argued in that case, but the other two judges concurred. In *Scott v. Scott*⁵ *Hodson J.* took the view that except in divorce cases security could only be ordered for the joint lives of the parties, but his observation to that effect was only obiter. The present case is essentially one in which security should be ordered for at least the joint lives of husband and wife.

K. Bruce Campbell for the husband. Only after there has been a divorce or a decree of nullity will the courts order security of maintenance payments for the duration of the wife's life. The reason for the distinction is clear. Where the marriage is subsisting, the husband can be called upon to make payments, but the wife would also have benefits still existing and possibly accruing. She has rights on intestacy and rights which may arise under the Inheritance (Family Provision) Act, 1938, also

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² [1956] P. 326.⁴ [1954] P. 55.³ [1954] P. 138; [1954] 1 All E.R. 1.⁵ [1951] P. 245; [1951] 1 All E.R. 216.

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widows' pension, etc. All those rights would cease to exist after divorce. That may account for the difference of wording of section 23 (2) and section 19 (2). Security is a matter for the discretion of the court, and the evidence as to the financial position of the husband would not justify a security order even for the joint lives of the parties. The decision of Willmer J. in *Bradley v. Bradley*⁶ should be disregarded because it merely followed the decision of Karminski J. in *McLellan v. McLellan*,⁷ which was merely obiter. The dictum of Hodson J. in *Scott v. Scott*⁸ is supported by the judgment of Sir Samuel Evans P. in *Tangye v. Tangye*.⁹

HODSON L.J. The question of security is not a very easy one. I have come to the conclusion, for reasons which I shall give, that section 23 (2) of the Act of 1950 operates so as to provide for security during joint lives and not for the wife's life—though different considerations arise in divorce cases, where provision has to be made for a wife after a divorce; and the statute clearly provides for security to be made in favour of a wife for a term not exceeding her life. But if I be right in thinking, as I do think, that under this section security only extends for joint lives, it is only, perhaps, in cases somewhat out of the ordinary that there is a real necessity for security to be given—cases where there is some reason to suppose that it will be difficult to obtain compliance with the order because the husband is likely to be out of the country or for some other reason, and, perhaps, in cases where there is ample free capital available which can be used for that purpose. In this case, the husband's margin of capital is not very great, taking the excess of capital over his debt to the bank; and, moreover, the wife is not wholly insecure, in that her own private income is a secured income which will, all being well, be with her for her life. Therefore, I have thought that this is not a case where we should order security. Of course, in coming to that conclusion I am influenced by the construction which I put upon the section; because if I had thought that the section enabled the court to give security for life for the wife, it is obviously to her advantage to get that, because the husband might die and the payment would die with him and she would be left with nothing from him. So it is necessary for me to give some reasons why I take the view that I do. I express my opinion with some diffidence because, in *Scott v.*

⁶ [1956] P. 326.

⁷ [1954] P. 138.

⁸ [1951] P. 245.

⁹ [1914] P. 201.

Scott,¹ I have already expressed an opinion which was obiter on this subject. *Scott v. Scott*¹ was a case under the predecessor of section 23, which we are now considering; and I began by pointing out,² as a matter of history, that the section in question, section 5 of the Law Reform (Miscellaneous Provisions) Act, 1949, "was clearly introduced in order to simplify the procedure by which in the High Court a wife might, in appropriate circumstances, obtain what are called periodical payments. One has to look at section 187 of the Supreme Court of Judicature (Consolidation) Act, 1925, which, after providing that a decree for restitution of conjugal rights should not be enforced by an attachment, provides that in the event of failure to comply with the decree the court may order the respondent to make the petitioner such periodical payments as may be just. In the second subsection, it is provided that the court may order the husband to secure to the wife the periodical payments. Section 5 in its two subsections follows the same line as section 187 in its two subsections, the position now being that instead of the husband who is living apart from his wife and whose wife desires maintenance being given the alternative of taking her back or showing cause why he should not do so, and, failing either, being ordered to provide for her periodical payments, a short cut, so to speak, can be taken, and the wife is entitled to say that she demands periodical payments provided that she can prove that he has been guilty of wilful neglect to provide reasonable maintenance for her or for her children." I expressed the opinion (which was not necessary to the judgment)³: "In the event of divorce, she is entitled to claim maintenance to be secured to her for her life as opposed to the period of joint lives, which appears to be the utmost that can be obtained under section 5 of the Law Reform (Miscellaneous Provisions) Act, 1949."

I there had in mind the decision (which has been followed ever since in periodical payment cases following a decree of restitution of conjugal rights) in *Tangye v. Tangye*.⁴ Sir Samuel Evans P. was of opinion that "The legislature did not contemplate that periodical payments ordered to be made under the Act of 1884 should be more permanent or fixed, or should extend for a longer period, than the alimony obtainable if the

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¹ [1951] P. 245; [1951] 1 All E.R. 216.

² [1951] P. 245, 247.

³ Ibid. 248.

⁴ [1914] P. 201; 30 T.L.R. 649.

C. A. "further relief provided for by the Act, namely, judicial separation, were obtained." He was of opinion that the order to make periodical payments was one made personally against the respondent; and he pointed out that an earlier decision, to the effect that security might be given for life, by Bargrave Deane J. in *Clutterbuck v. Clutterbuck*⁵ had not been followed by the same judge in a later case of *Campbell v. Campbell*.⁶

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Since the decision in *Tangye v. Tangye*⁷ it has never been contended, to the best of my recollection, that periodical payments can be secured for the life of the petitioner. In the language of Sir Samuel Evans⁸: "It cannot operate for a period longer than the joint lives of the husband and wife." The language used in section 23 (1) of what is now the Matrimonial Causes Act, 1950, is very closely parallel to the language used in the earlier Act; and on the face of it the payments in section 23 (1) are payments to be made personally by the husband to the wife—"such periodical payments as may be just." If that is so, it follows, I think, that where, in subsection (2), it is said: "Where the court makes an order under this section for periodical payments it may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife the periodical payments," it refers back to the periodical payments in subsection (1).

I am not unmindful of the other sections of this Act which deal with security for maintenance for the wife and for children, and sections which deal with maintenance and alimony otherwise; but I find nothing in those sections to lead me to suppose that the construction is otherwise than that which I have stated.

The dictum of my own was not followed—in the circumstances which will, I think, be stated perhaps more fully by Morris L.J. in his judgment—in a later case of *King v. King*.⁹ The matter of security did not arise directly, but Denning L.J., who delivered the first judgment of the court, did what I had earlier done—referred incidentally to what could happen under section 23. He said¹⁰: "... under section 23 the court can order the husband to secure the payments by a deed of covenant, depositing some of his property as security and covering her, not only during their joint lives, but also during widowhood." So far as I am aware, the matter was not argued before him any more than it

⁵ (1913) 29 T.L.R. 480.

⁶ Unreported (May 25, 1914).

⁷ [1914] P. 201.

⁸ Ibid. 211.

⁹ [1954] P. 55; [1953] 3 All E.R. 1029.

¹⁰ [1954] P. 55, 63.

was argued before me; but an order in those terms was made by Karminski J. in *McLellan v. McLellan*¹¹: periodical payments were ordered for joint lives, and in addition a security order was made in respect of a relatively small sum compared with the total, for the life of the applicant. The record in the registry has been examined, and I find that to be the order which the judge made.

The matter came before Willmer J. in *Bradley v. Bradley*,¹² where he referred to the conflicting dicta and, having referred to the *McLellan* case, followed the order which Karminski J. had made. Counsel have not been able to tell us whether any argument was submitted to Karminski J. before he made his order. The report of the case (which was reported on a different point) does not disclose whether this matter was raised; and Willmer J., if I may say so with respect, quite rightly followed the only decision which was in point, namely, the decision of Karminski J., and did the same thing in *Bradley v. Bradley*¹² as Karminski J. had done in the earlier case. Now that the matter has been argued, I am of opinion that security cannot be ordered under subsection (2) of section 23 for any period exceeding joint lives.

MORRIS L.J. We were invited to order security under the provisions of section 23 (2); and we were invited to fix security, if we fixed it at all, for the life of the wife. When Willmer J. had *Bradley v. Bradley*¹³ before him he had the observations of my Lord in *Scott v. Scott*,¹⁴ the observations in *King v. King*,¹⁵ and he had the knowledge that Karminski J. had made an order for security for the life of the wife in *McLellan v. McLellan*.¹⁶ It is interesting to note that Mr. Fairweather was counsel in *King v. King* in this court and was counsel in *Bradley v. Bradley*. In the course of his argument in *Bradley v. Bradley*¹⁷ he said: "In *Scott v. Scott*¹⁸ Hodson J. stated that, "upon an order on the ground of wilful neglect to provide "reasonable maintenance, a wife appeared to be entitled to claim "security only for joint lives. In *King v. King*,¹⁹ on the other "hand, Denning L.J. expressed the view that periodical payments under section 23 could be secured to a wife during her

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¹¹ [1954] P. 138; [1954] 1 All E.R. 1.

¹² [1956] P. 326; [1956] 1 All E.R. 543.

¹³ [1956] P. 326, 329.

¹⁴ [1951] P. 245.

¹⁵ [1954] P. 63.

¹⁶ [1954] P. 138.

¹⁷ [1956] P. 326, 329.

¹⁸ [1951] P. 245.

¹⁹ [1954] P. 55.

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“widowhood. This statement was at the highest merely obiter dictum.” Then the report says: “Counsel then stated that, having himself been engaged in *King v. King*, he had no recollection of argument having been addressed to the court on the point of the duration of the secured provision. The judgment, he said, had been delivered after the intervention of the long vacation and he submitted that the passage as to the duration of the secured provision had been inserted in the judgment per incuriam.”

Willmer J. had that material before him, and he said²⁰: “I am bound to note, however, that although the phrase only occurs in the judgment of Denning L.J., it was a judgment which was concurred in by both the other members of the court, neither of whom gave any separate judgment beyond expressing concurrence.” I was one of the members of the court, and, as the report shows,²¹ I delivered no separate judgment but contented myself with saying that I had had an opportunity of considering Denning L.J.’s judgment and that I was in agreement with it. Singleton L.J. agreed that the appeal should be dismissed.

The point which arose in *King v. King*²² is well summarized in the headnote. It was a case where a wife had obtained a decree of judicial separation from her husband, and she later applied to the court for an order for secured maintenance under section 23 in preference to applying for alimony under section 20 (2). The husband took the objection that the words defining the scope of the court’s jurisdiction excluded the wife’s application, she being already judicially separated. The decision of the court was that the word “jurisdiction” in section 23 was used in the special sense and meant that where the parties to a marriage had the requisite domiciliary or residential qualifications to enable a court to entertain proceedings for judicial separation, then the court had jurisdiction to entertain applications under section 23 by the wife of such marriage. The court decided that, as there were those qualifications, in that case the court had jurisdiction to entertain the wife’s application.

My recollection accords with that of Mr. Fairweather that no argument was directed to the point which now arises. The case was argued on July 30, 1953, and the judgment was given by Denning L.J. on October 12, 1953, and contained the passage²³:

²⁰ [1956] P. 326, 335.²¹ [1954] P. 55, 66.²² [1954] P. 55.²³ Ibid. 63.

"It would not seem to matter under which section she applies so long as an order is made for payments to her. But the difference is this: under section 23 the court can order the husband to secure the payments by a deed of covenant, depositing some of his property as security and covering her, not only during their joint lives, but also during widowhood: whereas under section 20 the court has no power to order any such security to be provided for her." The words "not only during their joint lives, but also during widowhood" must, I think, be regarded as having been obiter: there was no argument in that case on that matter, according to my recollection.

Although, therefore, I concurred in that judgment, I think that today it does become necessary to consider whether the wording with which I concurred in that obiter dictum is to be preferred to the obiter dictum of my Lord in *Scott v. Scott*.²⁴ In *Tangye v. Tangye*²⁵ the wording of section 2 of the Matrimonial Causes Act, 1884, was being considered: "From and after the passing of this Act a decree for restitution of conjugal rights shall not be enforced by attachment, but where the application is by the wife the court may, at the time of making such decree, or at any time afterwards, order that in the event of such decree not being complied with within any time in that behalf limited by the court, the respondent shall make to the petitioner such periodical payments as may be just, and such order may be enforced in the same manner as an order for alimony in a suit for judicial separation. The court may, if it shall think fit, order that the husband shall, to the satisfaction of the court, secure to the wife such periodical payment, and for that purpose may refer it to any one of the conveyancing counsel of the court to settle and approve of a proper deed or instrument to be executed by all necessary parties." That language is to be compared with the language in section 22 of the Matrimonial Causes Act, 1950, and also with the language in section 23, with which we are now concerned.

Sir Samuel Evans P. delivered a considered judgment. He referred to the order that might be made in the case of dissolution or nullity. In this connexion, section 19 (2) and (3) of the Act of 1950 may now be compared. The President said²⁶: "But even in such cases, namely, dissolution or nullity, any order made under subsection (2) of the same section cannot

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²⁴ [1951] P. 248.²⁶ Ibid. 210.²⁵ [1914] P. 201.

C. A. "be made for a longer period than the joint lives of husband
 1957 "and wife, and can be discharged, modified, suspended, revived,
 PIGOTT "or increased, according to the circumstances from time to
 v. "time. It was argued that because it was enacted in sub-
 PIGOTT. "section (2) of section 1 of this Act that the order should be
 Morris L.J. "'during the joint lives,' the absence of such words from
 "section 2 of the 1884 Act showed that the order could be for
 "the life of the petitioner." A similar point might have been
 suggested here. The President went on: "Such an argument
 "is wholly inapplicable to a statute dealing with wholly different
 "proceedings, and is hardly worth pursuing; but it may be
 "pointed out that probably the words 'during the joint lives'
 "were inserted in dealing with an order for monthly or weekly
 "payments in dissolution or nullity cases, in express contra-
 "distinction to the words 'for a term not exceeding her life'
 "which are to be found in the provision for orders to secure a
 "gross sum or annual sum in the same cases."

All those words apply in reference to subsections (2) and (3)
 of section 19. Then the President went on²⁷: "I have said that
 "in no case in practice, as far as I have been able to ascertain
 "in the registry, has an order for periodical payment been made
 "for the life of the petitioner, or for any term other than the
 "joint lives of the petitioner and respondent, since the passing
 "of the Act thirty years ago, except in the case of *Clutterbuck*
 "v. *Clutterbuck*²⁸"; and he went on to state that he did not
 think that that case should be regarded as binding authority.

Then he summarized his view in the words²⁹: "In my view,
 "an order for periodical payments under section 2 of the Act of
 "1884 cannot be made or secured for the life of the petitioner.
 "It cannot operate for a period longer than the joint lives of
 "the husband and wife, or until the court otherwise orders. I
 "am of opinion that, according to the law and practice, the
 "proper form of order for periodical payments in favour of the
 "wife in cases of restitution is that the respondent do pay to
 "her during the joint lives of herself and her husband, or until
 "further order of this court, the sum fixed, at the periods
 "specified."

That authority seems to me strongly to support the view of
 the matter that was expressed, obiter, by my Lord in *Scott v.*
Scott.³⁰ If one considers the wording of the section itself,
 section 23 (1) refers to ordering the husband to make to the

²⁷ [1914] P. 201, 210.

²⁹ [1914] P. 211.

²⁸ (1913) 29 T.L.R. 480.

³⁰ [1951] P. 248.

wife "such periodical payments as may be just"; and then subsection (2) says that the court may order the husband to "secure to the wife *the* periodical payments." I find it impossible to resist the view that "the periodical payments" referred to are those previously referred to in subsection (1), and those periodical payments, in my judgment, are periodical payments under an order that the husband should make payments to the wife, which I think refers to an order during joint lives.

For those reasons, I have come to the conclusion that, if it were proper to order security in this case at all, the security ought not to be for the life of the wife but at most for joint lives. Having, therefore, considered the question which has arisen, the view that I have formed is that which I have endeavoured to express and which coincides with that expressed by my Lord, with all the authority that my Lord's opinion, supported by his experience, commands.

SELLERS L.J. I agree with my Lords in their construction of section 23, subsections (1) and (2), of the Matrimonial Causes Act, 1950. The husband is called upon in given circumstances to pay under an order such periodical payments as the court may think just; and subsection (2) only deals with security to ensure that that order may be carried out. In contrast with that section, there is section 19 (2), where it is provided: "On any decree for divorce or nullity of marriage, the court may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life . . ." Those last four words are not present in section 23. I would accept the argument of counsel for the husband, when he contrasted the position between the case where the marriage was subsisting and the husband could be called upon to make payments but the wife would have benefits still existing and possibly accruing, and the case where, in divorce or nullity, she ceased to be a wife at all and thereby lost all her rights. In this subsisting marriage there are the rights on intestacy, there are any rights which might arise under the Inheritance (Family Provision) Act, 1938, widows' pensions, and benefits of that kind. The wife is not deprived of those rights under the circumstances which exist here, and that may be good reason for section 23 being in the terms that it is and not either (as I think) expressly or impliedly permitting the court to enforce or make an order for security for the duration of her life.

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As to the circumstances in which security would be ordered, it would be difficult, I think, to pronounce any general view. In this particular case, as it happens, the wife has some secured income of her own—not a very large amount. The husband, whilst having some capital, has apparently got it well wrapped up at the moment and it is not free, or not readily free, to be called upon as security. He is apparently going to remain in this country; there is no question of his living abroad. I agree with my Lords that, on the facts of this case, it does not seem appropriate that security should be ordered for any amount of the annual payment, which I agree should be a matter of an order under section 23 (1)—namely, the sum of £300 a year.

Appeal allowed save as to issue of security.

Solicitors: J. H. H. Kidgell & Co.; Marcy & Co.

A. W. G.

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22, 23.Hodson,
Morris and
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Husband and Wife—Condonation—Revival of condoned offence—Pleadings—Charges of sodomy and attempted sodomy in wife's cross-prayer—Whether capable of constituting revival—No evidence of effect on mind of person charged.

Husband and Wife—Condonation—Sexual intercourse—Whether single act conclusive against husband—Husband under influence of drug.

Husband and Wife—Practice (in matrimonial causes)—Pleading—Amendment of pleadings granted after close of evidence—Paucity of evidence on material issue—Danger.

False charges knowingly made against a spouse in pleadings in divorce proceedings are capable of constituting revival of a condoned matrimonial offence if it is shown that such allegations have operated or would operate on the mind of the spouse charged in such a way as to make decent married life together impossible thereafter.

A husband who had presented a petition for divorce on the ground of his wife's cruelty continued to see her thereafter, and had sexual intercourse with her on one occasion, May 27, 1956. On June 8 the wife filed her answer, denying cruelty and cross-charging him, inter alia, with cruelty. Her particulars of cruelty included charges of attempted sodomy on her on May 27 and sodomy on other occasions during the marriage. Alternatively, she

claimed that her alleged cruelty had been condoned by intercourse during visits on various dates. The husband's reply, as originally drafted on August 10, admitted the visits, but only to see the children, and the one act of sexual intercourse on May 27, but denied that it was or was intended to be condonation since it took place on her persuasion and when he was under the influence of an extra dose of a drug, the effect of which was to produce a sense of diminished responsibility. That reply contained no allegation of revival of her cruelty, if it had been condoned; and after it was filed there were further meetings between the parties. On January 3, 1957, the husband's reply was amended to allege only that if there had been condonation the wife's cruelty had been revived by the allegation of attempted sodomy in her answer. There were further meetings between the parties after delivery of the amended reply.

During the hearing before the commissioner in May, 1957, the wife was cross-questioned about the alleged attempted sodomy on May 27 and admitted that it might have been accidental; but the husband gave no evidence as to the effect on him of the charges in her answer. During the closing speech of counsel for the wife, counsel for the husband applied for and was granted leave to amend the husband's reply to allege revival by false charges *knowingly* made of *both sodomy and attempted sodomy*; and the commissioner granted the husband a decree and dismissed the wife's cross-prayer on the basis of the amended reply. On appeal by the wife:—

Held, (1) that on the evidence, the sexual intercourse on May 27 was a voluntary act on the part of the husband and was conclusive against him as establishing condonation.

Henderson v. Henderson [1944] A.C. 49; 60 T.L.R. 113; [1944] 1 All E.R. 44 and *Snow v. Snow* (1842) 2 Notes of Cases, Supp. i, applied.

Per curiam. The word "misconduct" as used by Viscount Simon L.C. in *Henderson v. Henderson* [1944] A.C. 49, 53, covers both cruelty and adultery; and, *prima facie*, there is no distinction between condonation of adultery and condonation of cruelty.

(2) That the late amendment of the reply was properly allowed; but that such amendments ought to be made at an earlier stage in order that evidence may be directed to them.

(3) That serious charges such as those made by the wife, if false and knowingly false, were capable of reviving antecedent cruelty, albeit made only in pleadings; but, that, as the husband had never shown by his behaviour or his evidence that he resented or would have been shocked by such charges, they did not here constitute revival.

Russell v. Russell [1897] A.C. 395; 11 T.L.R. 579 distinguished.

Moss v. Moss [1916] P. 155; 32 T.L.R. 468; *Beard v. Beard* [1946] P. 8; 61 T.L.R. 555; [1945] 2 All E.R. 306; and *Richardson v. Richardson* [1950] P. 16; 65 T.L.R. 613; [1949] 2 All E.R. 330 applied.

APPEAL from Mr. Commissioner Grazebrook Q.C.

The parties were married in 1944, and two sons were born in

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1945 and 1946. On January 28, 1956, the husband left the matrimonial home, the wife having on January 23 entered a nursing home for the treatment of alcoholism. On April 16, 1956, the husband filed a petition for the dissolution of his marriage on the ground that his wife had treated him with cruelty; the particulars alleged that her heavy and habitual addiction to alcohol and the behaviour resulting therefrom had caused him to suffer in health and personality, and that he had lost weight and was on the verge of a nervous breakdown.

After that petition had been served on her, the husband visited her on various dates; and on May 27 sexual intercourse took place between them in a caravan where she was then living, after the children had gone to sleep.

On June 8, 1956, the wife filed her answer to the petition. She denied in substance the cruelty alleged against her, and in turn alleged cruelty against her husband. She alleged, alternatively, that if she had been guilty of cruelty her husband had with full knowledge and with the intention of forgiving and remitting the offences condoned them by having sexual intercourse with her up to the date of their parting in January, 1956, and also on a number of dates after he had left her, in April and May, 1957, including the occasion on May 27. In the particulars of cruelty she alleged against him by paragraph 21 (18) that on that occasion (May 27) "the petitioner attempted to commit "sodomy on the person of the respondent, notwithstanding that "he well knew that the offence caused her considerable pain and "distress"; and by paragraph 21 (22) "that since the celebration "of the marriage the petitioner has committed sodomy on the "person of the respondent"; and she gave particulars of the alleged acts on occasions in 1946, 1947 and 1948. She alleged further that the petitioner had committed adultery with a named woman in 1954, and asked for the dissolution of her marriage, for the custody of the children, and for alimony pending suit, secured provision, and maintenance.

On August 10, 1956, the husband filed a reply to her answer. He admitted that he had visited his wife on the dates and at the places alleged in her answer, but claimed that it was only for the purpose of seeing the children; he alleged that on those visits his wife had tried to seduce him into having sexual intercourse with her. He admitted that on the occasion of May 27, 1956, he had had sexual intercourse with her but claimed that that was the result of her conduct and when he was under the influence of a large dosage of a drug, a tranquillizer, which had been prescribed

for him medically; he stated that evidence would be given that the effect of the drug in a large dosage would be to produce a sense of diminished responsibility comparable to a drunken condition. He denied that the act of sexual intercourse was or was intended to be a condonation of the wife's cruelty.

The parties again met after that reply had been delivered; but on January 3, 1957, the husband's reply was amended to include a further paragraph as follows: "Further, if, which is denied, the act of sexual intercourse (on May 27, 1956) amounted in law to a condonation of the respondent's cruelty as pleaded in the petition herein, the petitioner will say that the action of the respondent in making by paragraph 21 (18) of her answer herein dated June 8, 1956, a false accusation against him of attempted sodomy on the same occasion, has revived the cruelty so condoned." The alleged adultery was denied.

Further meetings took place between the parties after that amended reply had been delivered. On those pleadings the petition and cross-prayer came before Mr. Commissioner Grazebrook Q.C. in May, 1957. The husband, in his evidence, said that on the occasion of May 27, 1956, when he admittedly had intercourse with his wife, he did not really appreciate what he was doing and did not know whether he was coming or going. Under cross-examination he described in detail the events of that day and what happened before and after the intercourse. He sought to support his argument that the act had been involuntary by calling the doctor who had prescribed the drug for him; the doctor's evidence was that the drug if taken in large doses would have, and be expected to have, an effect, in an uncertain time, comparable with the effect of drunkenness. On the issue of revival the wife gave evidence as to the alleged attempted sodomy on May 27, 1956, and was asked directly in cross-examination whether it was not a wicked invention; and she conceded that it might have been accidental. The husband denied the charges but gave no evidence as to the effect on him of those charges by the wife. During the closing speech of counsel for the wife the commissioner's attention was called to the wife's evidence on the alleged attempted sodomy, and counsel for the husband thereupon applied for and was granted leave to amend the husband's reply so that it read that "the petitioner will say that the action of the respondent in knowingly making by her answer dated June 8, 1956, false accusations against him of sodomy and attempted sodomy has revived the cruelty so condoned."

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The commissioner rejected the evidence of the wife and accepted that of the husband. On the issue as to condonation, he held that in the circumstances of the case there had been no condonation because the husband was not in a state fully to appreciate what was happening and, moreover, that it occurred in a caravan which could not possibly be said to be a return to connubial cohabitation. He rejected the wife's allegations of cruelty against the husband and said that the adultery alleged was an invention by her; and he found the husband's charges of cruelty against the wife proved.

The commissioner went on: "If for any reason I should be "wrong in regard to that matter" [the issue as to condonation] "I am satisfied that there was revival of any condoned cruelty "by the false, and, as I think, malicious charge of sodomy made "against the husband. I do not accept that—as has been "contended on behalf of the respondent—there is any question "of privilege or public policy involved in regard to the wife's "allegations in the answer. It is an answer which is filed in "this Division of the High Court and it is supported by an "affidavit, and I can imagine nothing more serious or calculated "to upset the husband than the malicious and invented charge "of sodomy made in this case." He rejected the wife's prayer and granted the husband a decree nisi on his petition.

The wife appealed.

Harold Brown Q.C. and *H. B. Grant* for the wife. First, on the issue of condonation, the evidence of the husband and his doctor, which was accepted, shows that the husband was a free agent, and, in the absence of fraud, the principle laid down in *Henderson v. Henderson and Crellin*,¹ applied in *Baguley v. Baguley*,² that an act of sexual intercourse by a spouse who is a free agent is conclusive against him or her, applies to him; and nothing said by Dr. Lushington in *Snow v. Snow*³ supports the submission, apparently accepted by the commissioner, that where the charge is cruelty the presumption of forgiveness implicit in an act of sexual intercourse is rebuttable. The commissioner also erred in holding that because the act took place in a caravan in temporary use it did not constitute a reinstatement of the wife in the connubial household. [*Cramp v. Cramp and Freeman*⁴ was also referred to.]

¹ [1944] A.C. 49, 53; 60 T.L.R. 113; [1944] 1 All E.R. 44.

² Judgms. of C.A., No. 251/1957; *The Times*, Oct. 10, 1957.

³ (1842) 2 Notes of Cases, Supp. i, xiii.

⁴ [1920] P. 158; 36 T.L.R. 333.

[Counsel was stopped on the issue of condonation.]

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Secondly, the charges in the wife's answer did not revive the condoned cruelty. Though an act of revival may be something less than cruelty, it must be shown not only that these charges were capable of reviving the condoned offence but also that they did in fact so affect this husband as to "make decent married life together impossible," as Bucknill L.J. said in *Richardson v. Richardson*.⁵ But here there was no evidence that the accusations in these pleadings had any effect on this husband; and, on the contrary, there is evidence that he continued to see her long after the answer had been delivered and that he was not a man who would be shocked by such allegations. Moreover, this marriage had already broken down, whereas in *Richardson v. Richardson* ⁵ Bucknill and Denning L.JJ.⁶ regarded an act of revival as something which breaks up a subsisting marriage.

[HODSON L.J. But when the accusation was made, all the past offences had been condoned and the marriage was subsisting. The question is whether this conduct of the wife broke up that subsisting marriage. In *Russell v. Russell* ⁷ Lady Russell was not living with her husband when she made similar allegations against him and, though they were held not to be cruelty, Lord Russell was not ordered to go back to her so long as she persisted in the charges. Do you say that the fact that it is in a pleading gives it protection?]

Yes. An allegation in a pleading is not an act within the marital ambit. The object of pleadings is to state the issues for the court, and such a document is for some purposes absolutely privileged: *Bottomley v. Brougham*.⁸ If a pleading is privileged for one purpose it is so for all purposes. It would be odd if a statement in a document which is protected against another action could be used in the suit itself as evidence of malice and as an act against the husband sufficient to revive condoned cruelty. The Rules of the Supreme Court enable a litigant to strike out a malicious pleading. A dangerous situation might result if it were held that a mere allegation in a pleading is sufficient to effect revival or even to constitute a matrimonial offence, for a wife may have that issue decided against her although she may have an honest belief in her charge: compare the situation which arose in *Squire v. Squire*.⁹

⁵ [1950] P. 16, 21; 65 T.L.R. 613;
[1949] 2 All E.R. 330.

⁸ [1908] 1 K.B. 584.

⁶ [1950] P. 16, 19-20, 22-23.

⁹ [1949] P. 51; 64 T.L.R. 371;
[1948] 2 All E.R. 51.

⁷ [1897] A.C. 395; 11 T.L.R. 579.

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[SELLERS L.J. If a wife were so infirm that she was justified in making such allegations, or had a reasonable belief in them, it would not be held to be wrongdoing by her.]

The motive may be irrelevant and the intention all-important. It would be intolerable for legal advisers if an allegation in a pleading could be construed either as an act of cruelty or of revival; but it is conceded that in *Thompson v. Thompson*,¹⁰ where a similar point arose on pleadings—though it was not argued—Denning and Morris L.JJ. commented on it in their judgments.¹¹

Thirdly, leave to amend ought not to have been given at so late a stage in the proceedings on so important a matter; if the husband's reply had been pleaded in its final state at an earlier stage, the wife could in her evidence have dealt with the charges of having made the allegations "knowingly" and "maliciously."

[HODSON L.J. "Knowingly" does not add anything; she has never withdrawn them.]

Geoffrey Crispin and *Thomas Coningsby* for the husband. There was no condonation on May 27, for the accepted evidence is that this husband was not responsible for his act on that occasion; it was not voluntary, but was done under the persuasion of a wife who was trying to get him back after he had filed his petition, and who plied him with a drug which she said was harmless, even in an overdose. Therefore this husband falls within the exception stated by Viscount Simon L.C. in *Henderson v. Henderson and Crellin*¹² and is in the same position as the wife in *Keats v. Keats and Montezuma*.¹³ It follows that all the surrounding circumstances must be considered, and they show that this one sexual act did not constitute condonation. In *Tilley v. Tilley*¹⁴ Denning L.J. gave as the reason for the strictness of the rule on condonation by sexual intercourse in the case of a man "the prejudice which the wife may suffer if she has a child "as a result of it"¹⁵; in *Viney v. Viney*¹⁶ Lord Merriman P. used the word "voluntarily."¹⁷ In *Germany v. Germany*¹⁸ Langton J.¹⁹ said that in condonation cases one must look at all the circumstances. This husband's act was not voluntary and

¹⁰ [1957] P. 19; [1957] 1 All E.R. 161.

¹¹ [1957] P. 19, 32-33, 46.

¹² [1944] A.C. 49, 53.

¹³ (1859) 1 Sw. & Tr. 334.

¹⁴ [1949] P. 240; 65 T.L.R. 211; [1948] 2 All E.R. 1113.

¹⁵ [1949] P. 240, 261.

¹⁶ [1951] P. 457; [1951] 2 T.L.R. 705; [1951] 2 All E.R. 204.

¹⁷ [1951] P. 457, 466.

¹⁸ [1938] P. 202.

¹⁹ Ibid. 208.

he never intended to reinstate his wife. *Baguley v. Baguley* ²⁰ is distinguishable, for there a reconciliation had been discussed before the act of condonation took place. Here there was no mutuality in the act.

[HODSON L.J. Such an act is strong evidence of mutuality.]

But the surrounding circumstances must still be considered; that is the factor which, it is submitted, distinguishes condonation of adultery and condonation of cruelty. Almost all the authorities on condonation concern condonation of adultery; and though *Henderson's* case ²¹ is binding authority for the proposition that an act of sexual intercourse estops a husband from denying condonation of adultery, the word "misconduct" as used by Viscount Simon L.C. in that case is limited to adultery.²²

[HODSON L.J. What is the reason for distinguishing condonation of cruelty and of adultery?]

Cruelty is not merely adverse conduct but must also include injury to health; where parties go on living together until the last overt act of cruelty, there may be forgiveness or condonation by sexual intercourse before the injury to health becomes evident. The distinction between condonation of cruelty and of adultery is drawn by Dr. Lushington in *Snow v. Snow* ²³ and by Phillimore L.J. in *Moss v. Moss*.²⁴

On the charge of revival the material factor is not the evidence of its effect on the husband but the wrongdoing by the wife in making charges of this nature, in this way, publicly, in a court of law, by a pleading in answer to the petition of a serving naval officer. The court can infer that they would have shocked and injured him without having evidence of their effect on him. These charges are even more serious than those in *Russell v. Russell*,²⁵ for they are charges of acts on herself about which she knows the truth, whereas the sodomy alleged by Lady Russell was with a third party; and the House of Lords took a very severe view of such charges. It is not necessary to prove that they shocked this husband but only that they were calculated to shock and hurt him. It is wrong for a wife to make a false charge of sodomy against her husband.

[SELLERS L.J. Is not this treating a matrimonial cause in an artificial and purely forensic way?]

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²⁰ C.A., Oct. 9, 1957; *The Times*, Oct. 10, 1957.

²¹ [1944] A.C. 49.

²² *Ibid.* 53.

²³ 2 Notes of Cases, Supp. i, xiii.

²⁴ [1916] P. 155, 158; 32 T.L.R. 468.

²⁵ [1897] A.C. 395.

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This husband was complaining of conjugal misconduct. As to the nature of an act capable of reviving, Mr. Commissioner Blanco-White Q.C. stated the test in *Cundy v. Cundy, Smith and Finch*,²⁶ based on *Cooper v. Cooper*²⁷; see also *Bertram v. Bertram, per du Parcq L.J.*²⁸; *Beard v. Beard, per Scott L.J.*,²⁹ and *Beigan v. Beigan*,³⁰ showing that a very slight act may be sufficient.

[SELLERS L.J. In *Beigan v. Beigan* Denning L.J.³¹ said that it depended on the effect on the husband.]

On the lateness of the amendment, R.S.C., Ord. 28, r. 1, which governs amendments, is in very wide terms. Strictly speaking, this amendment was not essential, and in any event did no injustice to the wife, for questions on this issue were addressed to her in cross-examination.

Brown Q.C. in reply. The word "misconduct" in *Henderson v. Henderson and Crellin*³² was used comprehensively to cover "acts of violence" in the same manner as it was used in *Snow v. Snow*,³³ to which Viscount Simon L.C. had just referred. The only difference suggested between condonation of adultery and of cruelty is a distinction not applicable to the facts of this case.

HODSON L.J. said that in the Court of Appeal the wife had accepted the findings of cruelty made against her—not willingly, but because she recognized that the commissioner, who had heard her case, was entitled to come to the conclusion that he did on the veracity of herself and her husband and other witnesses who were called, and to find, on the facts proved, that there was cruelty. [His Lordship continued:] The appeal has been directed to the question, first of all, whether the cruelty, if any, on her part was condoned, and the subsidiary question whether, if it was condoned, it was revived by anything she did afterwards so as to destroy the effect of the condonation.

In order to deal with the first issue, that of condonation, it is unnecessary for me to go beyond the petition itself, the answer (in so far as the answer referred to condonation), and the reply (again in so far as it referred to condonation).

[His Lordship then stated the facts summarized above as to the contents of the husband's petition. He said that to be fair

²⁶ [1956] 1 W.L.R. 207n.; [1956] 1 All E.R. 245, 246.

²⁷ [1950] W.N. 200.

²⁸ [1944] P. 59, 61; 60 T.L.R. 360.

²⁹ [1946] P. 8, 22; 61 T.L.R. 555; [1945] 2 All E.R. 306.

³⁰ [1956] P. 313, 317-318; [1956]

2 All E.R. 630.

³¹ [1956] P. 313, 319.

³² [1944] A.C. 49, 53.

³³ 2 Notes of Cases, Supp. i, xvii.

to the husband, he was not a man who said that drink was abhorrent to him. He had admitted that he consumed considerable quantities of liquor in his wife's presence and as a preliminary to sexual intercourse; and that after the parting, when he met his wife, he drank with her, though she herself was not then drinking alcohol. Those matters had some slight bearing on the issue of condonation, which was the relevant issue to be determined, because admittedly, after the parting, the husband, principally in order to see his children, visited his wife frequently and spent a good deal of time in her company, not all of which was spent with the children. His Lordship then set out the substance of the wife's answer of June 8 in relation to condonation, and the husband's reply as originally drawn on August 10, 1956, and continued:] It is to be observed that in his pleading the husband does not allege that the act of intercourse which he had with his wife was not a voluntary act; and his comparison with drunkenness is remarkable when one remembers that the charges that he made against his wife were, although they both drank, that she drank so much that she behaved in a way of which he was entitled to complain as being cruelty to him: he does not say that because she was drunk she was not responsible and therefore there is no ground for relief. Similarly, he says with regard to his condition that it was like that of a drunken man; and that was the highest that his evidence on this matter can be put. He was cross-examined closely about the occasion when he admittedly had intercourse with his wife, and he said quite clearly that he knew what he was doing. He described in detail the events of that day—how his wife had undressed before him so that he knew she was trying to get him to have relations with her as a husband with a wife; and he said that he remembered protesting at one stage by saying: "Don't be silly: "of course we can't." The act was completed, and he described in detail exactly what took place and the steps that he took to avoid the risk of conception, and, further, what happened after that—how long he remained in the caravan with her, dozing for hours, until he finally left. He had said in his earlier evidence that he did not really appreciate what he was doing; but, coupled with those answers in cross-examination, the effect of his evidence—not in any way treating him as a man who was not to be relied upon as truthful—is that he knew perfectly well what he was doing and that this act of intercourse between himself and his wife was a voluntary act.

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He sought to support the argument that really this was an involuntary act by calling the doctor who had prescribed this drug for him. The commissioner referred to the doctor's evidence in connexion with the injury to health of which the husband complained, but did not refer to it specifically in connexion with this drug, and rejected the evidence of the doctor called by the wife which dealt with the effects of this drug. But I take it that the commissioner accepted the evidence of the husband's doctor, which was to the effect that this drug, although described as a "tranquillizer," was one which, taken in large doses, would have, and be expected to have, an effect (in a time which I think is uncertain) comparable with the effects of drunkenness in the sense, I suppose, of removing the emotional inhibitions which people of normal sensitivity have but which are lightened by indulgence in alcohol, causing them to feel less restrained in their actions than they would if they had not taken drink. But he never suggested that the reasoning powers of this man would be affected or that his knowledge of his conduct or his memory would be affected, and indeed the evidence shows that it was not. So that, so far as the act was concerned it was, on the evidence, in my judgment, plainly a voluntary act. The commissioner came to a different conclusion, but I am bound to say that, on this evidence, I think that any other conclusion is quite impossible.

The argument on the topic in this court has been perhaps a little more extended than it was below, and it has been said that all the surrounding circumstances when this act took place must be taken into consideration. The husband (whose evidence was believed) said that his wife had induced him to take these extra tablets of this tranquillizing drug, saying that they were no good anyway, that she knew all about them because she had had them when she was in the home where she had to go because she was addicted to drink, and in consequence of that he took an extra dose. I have read the particulars where the husband says that he was persuaded by his wife to take the extra dose. It is now said that, because the wife induced the husband to take to excess something which would affect and did affect his mental state or emotional state in the shape of these tranquillizing drugs, therefore the act was not truly a voluntary act. It is not alleged that there was fraud on the part of the wife: the highest that it is put against her is that there was persuasion. If a case of fraud had been sought to be made out it would have had to be alleged. It was not, and indeed it is not so contended. In the absence

of fraud, or consent induced by fraud, the voluntary act of sexual intercourse is conclusive against this man, in my opinion, in settling the question of condonation.

I need only refer to two cases. *Henderson v. Henderson and Crellin*,¹ in the House of Lords, was a case of condonation of adultery by a man, and it was held that, where a wife had been received back into the position of wife in the home, where further intercourse has taken place, "this will, subject to one exception, amount to clear proof that the husband has carried his forgiveness into effect. The exception is that, if the intercourse was induced by a fraudulent misstatement of fact by the wife, that circumstance will prevent the husband's actions from having the effect of condonation, as, for example, in *Roberts v. Roberts and Temple*.²" I have referred to the argument put forward on behalf of the husband in this case, which was that the act of intercourse could be ignored because of the persuasion of the wife, which is referred to in the pleadings.

In an important passage in the speech of Viscount Simon L.C. he draws a contrast between wives and husbands, pointing out that, although an act of intercourse is conclusive against a husband on the issue of condonation, it is not conclusive against a wife, for reasons which have frequently been stated. I desire to read one paragraph, for a reason which will appear³: "It has been more than once pointed out that the conclusion of condonation by an innocent wife of her husband's previous misconduct is not in all cases so strictly drawn from the fact of subsequent intercourse, for there may be instances where the innocent wife, owing to the difficulties of her situation, may have no means of immediately breaking off relations. In *Snow v. Snow*⁴ Dr. Lushington discusses at length whether, where a husband has been guilty of cruelty, a wife can ever maintain a suit where cohabitation was continued after the last act, and he concludes that subsequent cohabitation is not universally a bar to the wife's suit, for the reason above stated, but I know of nothing in the earlier decisions, either in the ecclesiastical courts or in the Divorce Court of this country, which supports the view that a husband who has intercourse which is not induced by the fraud of the wife after knowledge of the facts of his wife's adultery, should not thereby be regarded as condoning his wife's misconduct."

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¹ [1944] A.C. 49, 52.³ [1944] A.C. 49, 53.² (1917) 117 L.T. 157; 33 T.L.R.⁴ (1842) 2 Notes of Cases, Supp.

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The word "misconduct" is used twice in that paragraph, and it is used, I think, intentionally by the noble Lord (who was exceedingly exact in the use of language) in order to cover both cruelty (which was the subject-matter of the *Snow* case⁴) and adultery (which was the subject-matter of the *Henderson* case⁵). He was clearly of opinion, in my view, that the same consideration applied, where men are concerned, in condonation of cruelty as in condonation of adultery. For my part, I see no reason to distinguish the two matters; and no argument relevant to that point has really been addressed to this court. Indeed, counsel for the husband conceded that in what might be called the straightforward case of cruelty—possibly based on one terrible act of violence—it would be difficult to see why there should be any distinction between the two so far as condonation is concerned.

Viscount Simon, who had had his attention drawn to the case of *Snow v. Snow*,⁶ must have had in mind the very careful, considered judgment of Dr. Lushington, who was considering the difficult situation of a wife who, though treated with cruelty, was unable to leave her husband because they were travelling abroad, and the question was whether she must be taken to have condoned his cruelty or not. In his judgment Dr. Lushington⁷ quotes the opinion of Lord Stowell in a previous case of *Popkin v. Popkin*,⁸ reported in an earlier report. "'The acts of violence are not objected to; but it is said she consented to live with him. It is not, however, necessary for a wife to withdraw from cohabitation on the first or second instance of misconduct; it is legal and meritorious in her to submit to no inconsiderable degree of ill-treatment; to be patient as long as possible. Such forbearance is not permitted to weaken her title to relief. But here the cruelty is carried down to the latest period of the cohabitation.'" There the word "misconduct" is used in relation to cruelty, and that was the case that Viscount Simon had looked at when he made the speech which he made in *Henderson's* case.⁹ It is quite true that so far as cruelty is concerned any references to condonation of cruelty as such in the *Henderson* case⁹ are obiter; but there is no reason in principle (as I have already said) to differentiate between the two so far as I am aware. Therefore, in my judgment, on the evidence of the husband in this case—because that is the evidence on which this case falls to be determined—there was condonation.

⁴ 2 Notes of Cases, Supp. i, xiii.

⁵ [1944] A.C. 49.

⁶ 2 Notes of Cases, Supp. i.

⁷ Ibid. Supp. xvii.

⁸ (1794) 1 Hagg.Ecc. 765-766, note.

⁹ [1944] A.C. 49.

It only remains in this connexion for me to deal with one other matter which appears in the judgment, for the commissioner supported his conclusion that there was no real condonation because the sexual intercourse "occurred in a caravan where the wife was then living and it could not possibly, by any stretch of the imagination or otherwise, be said to be a return to connubial cohabitation." I confess that I see no substance in that circumstance, and, indeed, it has not been pressed before us in this court.

The position after May 27 was that the husband, having condoned the cruelty of the wife, had reinstated her, but he did not admit that that was the position, because he has maintained throughout that he never had any intention of doing anything of the kind; and the suit continued. In due course the answer of the wife was put in, on June 8, 1956. In that answer she not only alleged cruelty against her husband but also alleged sodomy on her—the full offence—and attempts at sodomy and adultery. All those charges failed.

The reply of the husband, which was dated August 10, 1956, as it originally stood, denied the condonation and denied the charges which the wife had made against him. But the commissioner decided the case in his favour, if he were wrong on the issue of condonation, by saying that, by reason of the false charges of sodomy which the wife had made, the cruelty had been revived. As the pleadings originally stood, there was no allegation of revival, and although the charge of sodomy and the other charges had been made in June of 1956 it was not until January 3, 1957, that any amendment was made to the reply to set up revival; and it was done in this form. "Further, if, which is denied, the said act of sexual intercourse (which occurred on May 27, 1956) amounted in law to a condonation of the respondent's cruelty as pleaded in the petition herein, the petitioner will say that the action of the respondent in making by paragraph 21 (18) of her answer herein dated June 8, 1956, a false accusation against him of attempted sodomy on the same occasion has revived the cruelty so condoned." Paragraph 21 (18) of the answer, the only matter referred to, was as follows: "That on the night of May 27, 1956, at the respondent's caravan the petitioner attempted to commit sodomy upon the person of the respondent notwithstanding that he well knew that the said offence caused her considerable pain and distress. By reason of the petitioner's conduct as

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"aforesaid the respondent has from time to time been in fear
"of the petitioner and has suffered in her health."

That was the state of the pleadings when the matter came to trial. It looked as if the only complaint that the husband was then making was limited to this one matter. When, in his final speech, counsel for the wife was addressing the court on this topic and pointing out that the wife had said in her evidence that on this particular occasion, which was an occasion when sexual intercourse admittedly took place, the wife was giving the husband the benefit of the doubt and saying that he might have appeared to be making an attempt at sodomy whereas it was not really so, counsel for the husband applied for leave to amend the reply so as to include not only this allegation of an attempt on one occasion but also false accusations knowingly made against the husband of sodomy and attempted sodomy. Thus the amendment sought included the word "knowingly," which was not there before, and included the word "sodomy," and was not limited to the one occasion. That amendment was not consented to by counsel for the wife, but leave was given.

The first question which arises is whether this case ought to be dealt with on the footing that that amendment was rightly made. The commissioner gave judgment on the amendment of the pleading and expressed his conclusion in these words: "I can imagine nothing more serious or calculated to upset the husband than the malicious and invented charge of sodomy that 'has been made in this case.' I need not read the rule as to amendments, but I think that the general principle was fairly stated by Bramwell L.J. in *Tildesley v. Harper*,¹⁰ when he concluded his observations by saying that the amendment should be allowed if it can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs. In this case, it is true that the evidence was not in the main directed to the issue whether or not this charge of sodomy had been knowingly made by a woman who knew that it was untrue. But it is right to say that Mr. Crispin, counsel for the husband, put it to the wife quite straightly in cross-examination that her evidence on this matter was a wicked invention. I think it is unfortunate that the matter was not crystallized at an earlier stage in the pleadings. I have in mind the situation as it was in the case which is well known in history—*Russell v. Russell*¹¹—where the lady had made and persisted in unjustified charges of the same character against

¹⁰ (1878) 10 Ch.D. 393, 397.

¹¹ [1897] A.C. 395; 11 T.L.R. 579.

her husband. They were of the same character, although the sodomy alleged was with another man and not (as in this case) with the wife herself. But the issue had been plainly put to the jury "whether the Countess did the acts in question honestly believing that she was making a charge that was true, or whether she did them not honestly believing that they were true, but for some ulterior purpose. On this the jury found that in her conduct and correspondence subsequent to the first trial she did not act bona fide."

In this case, that issue was not clearly formulated until a very late date; but the evidence which the wife has given and the cross-examination administered to her on behalf of the petitioner and her answers were before the commissioner; and I for my part am not prepared to say that an injustice was done to her by allowing the amendment even at that stage so as to make it right for this court to allow the appeal on that ground alone; so that I think we must deal with the case on the footing that the allegation was properly considered by the commissioner in its enlarged form. The form in which it was originally drafted is not, on the face of it, a very sensible form, because it looks as if the husband was prepared to swallow the larger charge of sodomy while complaining of the lesser charge of an attempt; and we were told that the pleading came to be drawn in this particular way because of some mistake. But dealing with the matter on the merits, we have the fact that the commissioner, although he had characterized the wife's evidence as false, had in some parts of his judgment referred to the possibility of her having imagined things. In this part of his judgment he comes to the clear conclusion that she knew that what she was saying was false. This is a matter which ought, I think, to have been more carefully considered, because it is quite obvious that charges may be made and may fail because they are not proved, without necessarily any conclusion adverse to the person making the charges being made. There are cases, for example, where the court comes to the conclusion that the person making the statements has not invented them but has been honestly mistaken, and acted on false information or even imagined things. But, the conclusion having been reached on this part of the case—albeit by a rather unsatisfactory route—one has to consider how the matter now stands.

There is no doubt in my mind that a charge of this kind is of such a nature that it is capable of reviving antecedent cruelty. As to the charge itself, it was considered in *Russell v.*

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*Russell*¹¹ as being, on the face of it, a very serious charge. The actual decision in the House of Lords is that a false charge of this kind is not sufficient evidence of cruelty in the absence of proof of injury to health or apprehension of the same. But the Court of Appeal had previously held that a charge of that kind, persisted in against the husband, who was protesting his innocence and showing his resentment of the charge, was a justification for his refusing to live with his wife and an answer to a suit for restitution of conjugal rights brought by her. That matter was not discussed in the House of Lords; but Lord Shand, one of the majority of their Lordships, said¹²: "The persistence "in gross charges of foul immorality, the truth of which she did "not believe, charges which were calculated so deeply to wound "her husband's feelings and to degrade him in the eyes of the "world, was cruelty—I should even say gross cruelty, in a wide "and popular sense of the words"; and all their Lordships were in agreement in regarding the repetition of the charge in the truth of which Lady Russell did not believe as a very serious matter.

In order to revive past cruelty it is not necessary, as a matter of law, that the matter relied on should itself be cruelty. I only propose to refer to two cases on this topic. The first is *Moss v. Moss*,¹³ a decision of the Court of Appeal. That case is rather complicated by the references to Scottish law, which, as to revival, is not on the same footing as English law; but in dealing with cruelty I think that what Phillimore L.J. said is relevant¹⁴: "Perhaps it is not necessary to make a sharp and "definite exception of cruelty or to say that in complaints of "cruelty a matrimonial offence insufficient in itself will displace "condonation sufficiently to entitle the sufferer to a decree. For "in truth when a course of conduct is to be considered it is "impossible altogether to dissociate present conduct from the "past, and acts not so grievous in themselves may nevertheless "operate grievously on the mind of the sufferer either as recalling "past acts of violence or as causing fear of their recurrence." There is a reference there to the operation on the mind of the sufferer of acts inflicted on him.

There is also the later case, in the Court of Appeal (also a case where the question of revival of cruelty was discussed) of *Richardson v. Richardson*.¹⁵ Bucknill L.J. had referred to the difficulty in finding the proper test in determining what would be

¹¹ [1897] A.C. 395.¹⁴ Ibid. 161-162.¹² Ibid. 466.¹⁵ [1950] P. 16.¹³ [1916] P. 155.

sufficient to revive, and he said that he thought that¹⁶ "the proper test to apply is one which is indicated by the words of Sir Francis Jeune P. to which I have just referred, that the conduct of the spouse must be such as to make decent married life together impossible. That is putting it as broadly as I can." Denning L.J., in the course of his judgment, referring to conduct capable of reviving past cruelty, said this¹⁷: "The subsequent conduct may consist of harshness of behaviour short of cruelty, but if it breaks up the marriage that is sufficient to revive the adultery. . . . In the result, therefore, harshness, or neglect of a real and substantial kind which is such as to be likely to inflict misery on the innocent party, and does indeed lead to a breakdown of the marriage, is sufficient to revive the original offence." He then went on to apply the test to that case and said¹⁷: "If the commissioner had found that the husband's conduct was the cause of the breakdown of the marriage, the condoned adultery would, I think, have been revived."

I am of opinion that charges of this nature are sufficient when they are false, and knowingly false, to revive condoned cruelty. I am not criticizing the commissioner when he says "I can imagine nothing more serious or calculated to upset the husband than the malicious and invented charge of sodomy." I think that of the ordinary man—although there are a great many extraordinary people about—that is perfectly true; and it is none the less true because the charge relied on was made in a pleading. This situation was considered in passing, without argument, by this court in *Thompson v. Thompson*¹⁸ by Denning and Morris L.J.J. That was a case where the condition of pleadings was under consideration, and this particular point was not referred to in argument, but the judgment of Denning L.J. contains this passage¹⁹: "He has in his petition"—that is, the husband—"charged his wife with perjury in the prior maintenance proceedings. He has said that she falsely and maliciously swore that he treated her with cruelty and so forth. His charge of perjury is so comprehensive that, in order to investigate it, the court will have to go into her allegations all over again. He has set up this charge of perjury in order to revive any condoned cruelty." Morris L.J.²⁰ touched on the same topic.

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¹⁶ [1950] P. 16, 21.¹⁷ Ibid. 22, 23.¹⁸ [1957] P. 19; [1957] 1 All E.R.¹⁹ [1957] P. 19, 32-33.²⁰ Ibid. 46.

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In respectful agreement with those two members of the court, I see nothing impossible in the contention that reliance can be placed on matters of this kind, even though they only appear in a pleading. Of course, in this case the charges were not only contained in the pleading but they were repeated in a public court when persons were there to hear the evidence given. It is no answer to say that a pleading is in a class by itself and is specially protected, on the analogy of those cases where it has been held that statements made in a pleading are absolutely privileged, and the question of malice cannot be considered.

That brings me to the last point in this case: Can it be said, these charges having been made and it having been found that they were wilfully wrongly made, that this cruelty had been revived? The husband never took any steps himself to complain or to express his resentment of those charges. The answer contained them, having been put forward in June. His advisers put forward a plea in an imperfect form, and that not until January, 1957; and it was not until the trial itself that the full plea of revival was put forward on his behalf. It would be unreal to say that this allegation of the wife had any influence at all in preventing the continuance of the re-constitution of the marriage which had been brought about by the condonation. The husband never gave any evidence to that effect; and, indeed, his evidence tended to the contrary, because it shows that after June, when the answer must have been brought to his attention—because he replied to it in August—he was seeing his wife—no doubt primarily for the purpose of seeing his children, but he was remaining in her company for hours at a time after the children had gone to bed or when they were not present—showing no sort of resentment at her charges nor claiming in any way that by making them she had rendered the continuance of their married life together utterly impossible. After the incident in May, the uncontradicted evidence shows that they were together in November—not that there was sexual intercourse between them, but they were together and seeing one another, the husband being a free agent in this matter. In January of the following year, a few days after the amendment had been made on his behalf and sworn to by him, he was spending time with his wife first of all at two hotels in Nottingham and later for some hours at the house where he was then living, which he was showing her in order to convince her that his living was not so luxurious as she professed to believe. There is nothing in his conduct as shown by the evidence, and nothing in his direct evidence, to

indicate that this allegation of the wife had any effect whatever on him; and if what was said in *Richardson v. Richardson* ²¹ is correct, that, in my view, determines against the husband this issue of revival.

I respectfully agree with all that Denning L.J. ²¹ said on this topic. In his opinion it was clearly vital to consider whether the husband's conduct was the reason for the breakdown of the marriage. Reversing the situation, it is vital to consider whether the wife's conduct in making these charges was a cause of any resentment at all in the husband and of a refusal on his part to continue to consider the possibilities of life together. In *Russell v. Russell* ²² the evidence was strong and clear that Lord Russell was grieved and distressed by the allegations, which he did his best to stop and to persuade his wife to drop—to persuade her to admit that, even if she had been told gossip about him, she was now satisfied that it was untrue. She refused, and that operated on his mind. There is no such evidence here, and I am unwilling and unable to find anything in this case to take the place of such evidence or to draw any inference in favour of this man that he must have been so shocked by these charges as Lord Russell was.

It is not, I think, wholly irrelevant to look at what this man used to write to his wife. This man, who professes—through his counsel, it is true: he has not been dishonest in evidence himself; he said nothing—that this is a shocking charge to make and that the inference ought to be drawn that it shocked him, is a man who, in 1949, years before, was writing erotic letters to his wife. [His Lordship referred to the contents of one of the letters and said that it contained references which made it exceedingly improbable that an allegation of this kind made by her would have any disastrous effect on his feelings. He concluded:] For these reasons, I think that this appeal must be allowed.

MORRIS L.J. I agree. The first question which arises is whether there was condonation. The husband left his wife on January 28, 1956, and his petition was filed in the following April. It is beyond dispute that on May 27 there was intercourse between him and his wife. It is said that that intercourse took place when he was not in a state fully to appreciate what was happening. *Henderson v. Henderson* ²³ is authority for the

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²¹ [1950] P. 16, 21, 22-23.

²² [1897] A.C. 395.

²³ [1944] A.C. 49.

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proposition that sexual intercourse with knowledge of a wife's adultery amounts to condonation of it unless she induced the intercourse by a fraudulent misstatement of fact. In the present case, the charge against the wife was a charge of cruelty. If there was voluntary sexual intercourse it seems very difficult to understand why, on ordinary processes of reasoning, that sexual intercourse should not amount to condonation of cruelty, just as it would have amounted to condonation had there been adultery. The only difference that Mr. Crispin sought to submit in reference to cruelty cases was that there might be a case where there would be acts of cruelty on the part of a wife not immediately followed by an injury to the health of the husband, where intercourse then took place and where later the cruelty resulted in some injury to the husband's health. Mr. Crispin said that it might be argued that intercourse would not amount to condonation in such a case. If that is capable of argument, it will have to be argued in a case in which the facts give rise to the possibility, if anyone so wishes, of so submitting. That is not this case. In the present case, the petition alleging cruelty was on the file on April 18, and then intercourse took place on May 27. Mr. Crispin did, therefore, very fairly and frankly agree that the only issue on this part of the case was whether the husband's act was a voluntary act on his part. We have, therefore, been invited to read carefully the evidence in regard to this part of the case; and the whole of the relevant evidence has been put before us. We have had the transcript of the evidence of some medical witnesses. We have had the transcript of the husband's evidence, and of the wife's evidence. The commissioner formed the view that the husband, on the day in question, "was not in a state fully to "appreciate what was happening," and that "he was not in his "full mental condition and did not realize." He referred to the husband saying in his evidence that he did not know whether he "was coming or going."

It is not necessary, and indeed it is undesirable, to refer in detail to the evidence, which had to be very precise. The husband's evidence showed that he had a full recollection of what happened. It is said: Well, that is not in itself enough to show that he still may not have been master of his own actions. But there is further evidence—detailed evidence—given by the husband, showing the way in which he conducted himself and decided to conduct himself at the time in question. I can only say that, having had the careful assistance of both sides in reviewing this evidence, I find it impossible to share the view

reached by the commissioner, and I have formed the definite conclusion that this evidence does not support the view that this was not a voluntary act of the husband but shows that it was the act of a husband who knew exactly what he was doing.

If that conclusion be correct, there was, therefore, on May 27, condonation. I pass, therefore, to say a word or two on the other part of the case, namely, the question of revival. I do not pause to add anything on the question of the amendment of the pleadings. I fully concur in what my Lord has said. In regard to revival, we were referred to many authorities, including that of *Beard v. Beard*²⁴ where Scott L.J., towards the end of his judgment, said²⁵: “The trend of judicial decision from 1730 “onwards till the present year has been to uphold the rule that “the bar of condonation continues only so long as the matri- “monial conduct of the repentant spouse continues to be such “as the Divorce Court can accept as consistent with matrimonial “duty, and that when a fresh matrimonial wrong is done the “condonation ceases to confer protection and the right of the “other spouse to proceed in the Divorce Court revives. In my “opinion any other rule of law would not only be socially “intolerable, but inconsistent with the real principle underlying “the long line of cases and expressly mentioned in several of “them though in slightly varying language, namely, that there “must be no substantial digression from the path to which “their marriage vows have bound the parties, of what is some- “times called in old but telling words ‘conjugal kindness.’ A “‘matrimonial’ or ‘marital offence within the cognizance of the “‘Divorce Court’ in my opinion simply means conduct which in “the eye of that court is wrong, whether it does or does not “reach the duration, or gravity, or completeness which is neces- “sary to permit of a decree, provided always that it be suffi- “ciently serious for the court to regard it as a substantial breach “of duty.”

My Lord has referred to the judgments in *Richardson v. Richardson*.²⁶ I refer only to an additional sentence or two from the judgment of Denning L.J. He said²⁷: “If the guilty “husband”—he was dealing with such a case—“after being “taken back, does not behave properly, and the marriage breaks “down afresh by reason of his conduct, without any fault of the “innocent wife, she is entitled to rely on his original guilty act

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²⁴ [1946] P. 8; 61 T.L.R. 555;
[1945] 2 All E.R. 306.

²⁵ [1946] P. 8, 22.

²⁶ [1950] P. 16.

²⁷ Ibid. 22.

C. A. " as a ground for divorce. Any other view would greatly hamper
1957 " attempts at reconciliation, for no innocent party would be
BENTON " inclined to take a guilty party back if it meant being tied for
v. " ever to an unhappy marriage. The subsequent conduct may
BENTON. " consist of harshness of behaviour short of cruelty, but if it
Morris L.J. " breaks up the marriage that is sufficient to revive the adultery."

It seems to me that the making of gross charges might be calculated so to wound and so to degrade that they might be most serious and might constitute a grievous breach of matrimonial duty so as²⁸ "to make" (in the language of Bucknill L.J.) "decent married life together impossible."

Having said that, I think that the matter has to be decided in this case according to the particular facts of this case. Those facts are striking and almost unique. My Lord in his narrative has referred to them. On May 27, if the view that we have formed is correct, there was condonation. On that view, the husband ought to have gone to his solicitors and said that the matter was at an end. But nothing of that sort happened, and it became necessary for the wife to put in her answer. That she did in the early part of June, 1956. What is said is that, by putting in that answer, there was this serious matrimonial conduct which constitutes revival. If that was the right view of the answer of June 8, it seems to have been a case where the effect was entirely delayed-action effect, for it was very nearly seven months before any dependence was placed upon this matter. The reply had been put in in August, but it was not till the very end of the year that leave to amend was obtained, and the reply was amended on January 3 to plead revival. And even then, when there was the pleading, the complaint was of a false accusation of shameful deeds attempted but no complaint of a false accusation of shameful deeds done. The husband, in the course of his evidence, said nothing at all about the matter. He had, as we now know, visited his wife in November. He had visited her on January 22, which was after the date of the amended answer. He never said anything to the effect that he regarded himself as being an aggrieved person who had been bitterly wounded. He was recalled at the end of the hearing on the sixth day, and he still preserved his entire detachment from having any concern with this point.

It seems to me, therefore, that on the facts of this case there is an air of complete artificiality about this point. It seems to me, on this plea, on the facts of this case and dealing with this

²⁸ [1950] P. 16, 21.

petitioner—the petitioner who had written the letters to which we have unfortunately had to be referred—quite artificial to say that there was revival. I cannot but think that the case is rather withdrawn from the realm of reality and is made to seem like some kind of crude contest in which success or failure is made to depend on the astuteness or the defects of rival pleas in a bitter battle of wits. I think that this plea is quite unreal and artificial and, on the facts of this case, ought not to succeed.

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SELLERS L.J. I agree, and I am content to adopt rather than repeat the reasons, on all the points, which have commended themselves to both my Lords.

Appeal allowed.

Decree nisi set aside and petition dismissed.

Leave to appeal to House of Lords refused.

Leave to appeal against order of October 18, 1957.

Order not to be drawn up until further order.

Solicitors: J. D. Langton & Passmore for Walker, Templer & Thomson, Tonbridge; Culross & Co.

M. M. H.

MACALPINE v. MACALPINE.

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April 12,

June 26, 27.

Sachs J.

Husband and Wife — Divorce — Foreign divorce — Fraud — Respondent prevented from having notice of proceedings — Whether foreign decree valid.

Conflict of Laws—Foreign judgment—Fraud.

When a decree as to status of a foreign court, which has proper jurisdiction over the subject-matter of the suit, is shown to have been procured by a fraud which prevented the respondent spouse having notice of the proceedings, that decree will be treated in this country as a nullity.

A husband obtained by fraud in one of the United States of America a decree of divorce, falsely averring that he was completely ignorant of the whereabouts of his wife, although he was in fact in communication with her in England throughout the material time. He subsequently “remarried”:—

Held, that the American decree must be treated as a nullity here and that, as the marriage between the parties had never by English law been dissolved, the wife should be granted a decree nisi of divorce on the ground of adultery.

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UNDEFENDED PETITION for divorce or, in the alternative (but which was not the primary contention), for a declaration of the validity of an American decree.

The following statement of facts is taken from the judgment: The marriage took place in October, 1930, when both the parties were aged 31. They lived together at various addresses and finally at 2, Albion Gate, London, which was their matrimonial home until the outbreak of war, when the husband rejoined His Majesty's forces. There was no issue of the marriage.

In 1942 the husband was posted to the United States, where he became a member of the Military Mission. He returned to this country temporarily in September, 1945, when the wife was still residing at Albion Gate. Then he returned to the Mission, was in due course demobilized, but, save for an occasional visit to this country, remained in the United States. According to the evidence he was, at the time of the hearing, a farmer at Kremmling, in the State of Colorado.

The wife remained in England, living consistently at Albion Gate, until March, 1949, when she moved to a flat in Hill Street. Her petition as presented on August 27, 1956, came within the jurisdiction of this court by virtue of the provisions of section 18 (1)(b) of the Matrimonial Causes Act, 1950.

As regards the period September, 1945, to January, 1954, the husband and wife kept up a somewhat desultory correspondence which was friendly in tenor. Each party seemed to have written to the other some two or three times a year; there was never an interval as long as a complete year between the letters sent by the husband or between the letters sent by the wife.

The husband did not invite the wife to join him in the United States and the wife did not suggest that she should do so; indeed, the position was one of consensual separation.

During that period from 1945 to 1954 the wife was on friendly terms with the husband's mother, who lived in Guernsey, and used both to correspond with her and to visit her. The husband's mother was also during that period in regular correspondence with the husband.

As regards the position between 1945 and March, 1949, the husband throughout by virtue of his correspondence with his wife and with his mother was fully aware of the wife's address and as to how he could communicate with her. In December, 1948, he initiated proceedings for divorce against his wife in a district court in the State of Wyoming. (His domicile of choice in that

State at the time of those proceedings was accepted and no question arose as to the jurisdiction on the question of domicile.)

The petition itself was dated December 2, 1948, and the affidavit in support was dated the previous day. The ground upon which the decree was sought appeared in paragraph 4 of the petition, which read: "That the plaintiff and defendant have lived apart for eight years, without cohabitation, and that such separation is not upon a ground that would justify said separation if said ground were charged to this plaintiff." Paragraph 6 of the petition read: "That the plaintiff does not know the whereabouts of the defendant and her address is unknown, plaintiff having not seen nor heard from her for more than three years, and she is a non-resident of the State of Wyoming." The facts alleged in paragraph 6 were verified by the husband's own affidavit in support of the petition, and in addition the husband's attorney by a duly authorized affidavit dated December 2, 1948, swore as follows: "That he is reliably informed by this plaintiff, and your affiant therefore states, that the residence of the defendant herein is unknown and cannot with reasonable diligence be ascertained, for it is believed that the present residence of the defendant is somewhere in South Africa." Thereupon it appeared that a notice of suit was published in Wyoming local newspapers of December 3, 10, 17 and 24, 1948. No notification of the proceedings was sent by registered post either to the wife's address at Albion Gate, nor to the husband's mother in Guernsey, with a view to it being forwarded to the wife from there. If the district court had been made properly aware of the true facts as regards the wife's situation and as to the way in which communications would normally have reached her, the court would have ordered the husband to send a notification of the proceedings by registered mail, and that notification would either have been sent to Albion Gate or to the mother for forwarding to Albion Gate or both.

On February 11, 1949, the husband filed a further affidavit relating to the absence of knowledge of his wife's whereabouts. This was in the following terms: "That he is the plaintiff in the above entitled action; that the residence of the defendant herein is unknown to affiant and cannot with reasonable diligence be ascertained and that service of summons cannot be made within this State on the defendant." Thereupon he was granted a decree absolute on February 11, 1949.

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The court noted that the statement of the husband in paragraph 6 of his affidavit verifying the petition, the information which he gave to his attorney as stated in the affidavit of December 2, 1948, and the facts as deposed to in the husband's affidavit of February 11, 1949, were to his knowledge wholly untrue.

Next, as to the period from the date of the above decree to January, 1954. The husband and wife continued in the friendly but desultory type of communication to which reference has already been made. The husband made no mention of his having obtained a divorce, and indeed some of the phrases in his letters were quite clearly written with a view to leaving his wife in continuing ignorance on that subject.

In September, 1951, he "married" one Helen W. Colbert in the State of Colorado. He did not inform his first wife of that fact and, moreover, a letter which he wrote in August, 1953, was clearly designed to let her continue under the impression that there had been no such thing as a divorce or a remarriage on his part.

In January, 1954, however, the wife got to know the true position. She was then in Guernsey visiting the husband's mother, who was seriously ill, and it was then that she was told by the husband's mother of the facts. When the husband came over to this country in February of that year he visited the wife every day. On the first occasion he told her nothing about the divorce or remarriage, but on the second occasion the wife tackled him and he admitted the true position. On that occasion he used words which indicated that he thought that according to the law of this country he had committed bigamy.

The wife presented a petition for divorce on the ground of adultery with the second "wife," alleging that the American decree was void as it had been obtained by fraud; in the alternative, and in order that her status might in any event be clarified, she prayed for a declaration that she was no longer married to the husband.

Colin Duncan for the Queen's Proctor. English courts will not treat a foreign decree as a nullity if a fraud goes to the merits of the case upon which the decree has been granted, but they will do so if the foreign court in fact had no jurisdiction to entertain the suit. [Reference was made to *Bater v. Bater (orse. Lowe)*.¹] The authorities also establish that our courts will not interfere with a foreign decree, although the respondent in the foreign

¹ [1906] P. 209; 22 T.L.R. 408.

proceedings had not been informed of them and was thereby unable to defend, provided that there had been a proper compliance with local rules for substituted service which approximated to our own: *Maher v. Maher*,² *Igra v. Igra*,³ in both of which it was held that the true ratio decidendi of *Rudd v. Rudd*⁴ was want of jurisdiction, and in which the suggestion was rejected that the divorce in *Rudd v. Rudd*⁴ might have been held invalid upon the basis that the divorce was contrary to natural justice because one party had no notice of the proceedings. See also *Boettcher v. Boettcher*.⁵

But although the English court "should be slow to brand a "foreign decree as contrary to natural justice . . . merely because "notice did not in fact reach [the other party]" (*Igra v. Igra*⁶), it remains open to the court, after a consideration of all the relevant factors, to decide in cases where notice has not in fact been received whether or not it would be "contrary to natural "justice to treat the foreign judgment as valid": *Pemberton v. Hughes*,⁷ cited in *Igra v. Igra*.⁸ It is submitted that prima facie such absence of notice is contrary to natural justice, and that the cases such as those referred to are the exception.

If, however, our court finds that the rules relating to service of the foreign court have been rendered nugatory by fraud, then such circumstances must amount to an offence against natural justice. It is submitted that that is the situation here and that the Wyoming decree must accordingly be treated as void by this court. [*Castrique v. Behrens*⁹ was also referred to.]

C. Trevor Reeve for the petitioner. Any foreign judgment obtained by fraud whether in personam or in rem is to be regarded in this country as a nullity. [Reference was made to *Ochsenbein v. Papelier*.¹⁰] The Wyoming decree was obtained by fraud, and must accordingly be considered here a void and not a voidable decree, whatever view may be taken in the United States. On the facts of this case there is a fraud which goes also to the jurisdiction of the foreign court, for the husband took deliberate measures to ensure that the proper procedural steps miscarried. By depriving a court of the opportunity of hearing the parties in accordance with the rules the court is deprived of proper jurisdiction and the decree is therefore to be treated as void on that

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² [1951] P. 342; [1951] 1 T.L.R. 1163; [1951] 2 All E.R. 37.

³ [1951] P. 404; [1951] 2 T.L.R. 670.

⁴ [1924] P. 72; 40 T.L.R. 197.

⁵ [1949] W.N. 83.

⁶ [1951] P. 404, 411.

⁷ [1899] 1 Ch. 781; 15 T.L.R. 211

⁸ [1951] P. 404, 410.

⁹ (1861) 30 L.J.Q.B. 163.

¹⁰ (1873) L.R. 8 Ch. 695.

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ground also. The husband's action here has resulted in a "defect" in the initiation of the proceedings, or in the course of the "proceedings," which made it "contrary to natural justice to treat the foreign judgment as valid": *Pemberton v. Hughes*.¹¹

[SACHS J. I am not inclined to support a proposition that where there has been a compliance with the local rules as to service, those proceedings can in no circumstances be held contrary to natural justice.]

This case is to be distinguished from *Wiseman v. Wiseman*,¹² where an absence of fraud was expressly found and the decree absolute (which was in fact set aside) was held to have been a voidable and not a void decree. Dicey's Conflict of Laws, 6th ed., rule 78, states that "A foreign judgment which is obtained by fraud is invalid in England . . ."

The respondent did not appear nor was he represented.

SACHS J. stated the facts and continued: From what I have stated above it is clear that the husband in 1948 deliberately set about deceiving the court of Wyoming into letting the petition come to trial without the wife being sent proper notification as to the proceedings that were being taken. The statements relating to his knowledge of his wife's whereabouts both in his own affidavits and in the affidavit which he authorized his attorney to swear were in essence palpably untrue. Accordingly, the Wyoming decree was obtained by fraud.

Owing to his further subsequent concealment of the true state of affairs from his wife she did not discover what had happened until 1954, and I am satisfied that there has been no undue delay after that date, having regard to the difficulties of the position, in her coming to this court to obtain such relief as she may be entitled to.

The petition in the present cause alleges that the Wyoming decree was obtained by fraud and that accordingly it has no force. On that footing the wife claims that the husband has committed adultery with Helen Colbert, the woman with whom he is purported to be married.

The wife in the present proceedings has stated in evidence that she wishes to be freed from doubt as to what her status is; that she resents being put into a position of what might in this country be taken to be the guilty party in a divorce suit; and that she wishes for good reasons that this injustice should be

¹¹ [1899] 1 Ch. 781.

¹² [1953] P. 79; [1953] 1 All E.R. 601.

rectified if the court has power so to do. On these matters I unhesitatingly accept her testimony, as I do on all the facts to which she has spoken. If the court's duty, however, is to recognize the above decree as valid, the wife has stated by her counsel that she wishes alternatively to establish either through the judgment of this court or by formal declaration that she is no longer a married woman.

Upon the evidence before me it is clear that according to the law of the United States of America the Wyoming decree could be set aside by the wife if, upon taking suitable action in the courts there, she established the facts which I have found to be proved. It is equally clear that according to the same law the decree in question is voidable and not void and that thus it would, unless set aside upon some such application as I have indicated, be held to be valid throughout the United States. Although there is no specific evidence to that effect, I do, if and in so far as it may be relevant, assume it to be the law there that the decree would upon such an application as I have indicated be set aside without reference as to whether or not the wife could persuade the Wyoming court that according to the law of that State she had a defence to the original petition there. Mr. Reeve tendered no evidence on this point as he submitted that one must *prima facie* assume that the law there on that matter follows English law, and that accordingly any judgment obtained by fraud falls also in that State to be set aside *ex debito justitiæ* when once the matter is properly brought to the court's attention.

The point for decision here today is accordingly a short one. When the decree as to status of a foreign court having proper jurisdiction over the subject-matter of the suit is shown to have been procured by fraud which prevented the other spouse having notice of the proceedings, is that decree to be treated as a nullity in this country? Or is it regarded in this country as valid unless and until a proper application is successfully made in the foreign country to set it aside? As there could not be excluded with certainty the possibility that other parties in addition to the husband and wife might be affected by the decision of this court (e.g., when clauses in trusts or wills fall to be construed), and as, further, the issue itself was of some importance and is not covered by direct authority, it seemed best to ask for the assistance of the Queen's Proctor in argument. That assistance has been duly given, and I take this opportunity of once more thanking Mr. Duncan for the very real help he gives in cases in which he represents the Queen's Proctor.

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As appears from the judgment of the Court of Queen's Bench in *Castrique v. Behrens*,¹ "the principles upon which the courts of this country disregard a foreign judgment obtained by fraud differ according to whether that foreign judgment was in rem or in personam on a contract." Similarly it appears that the principles upon which the courts here act in the latter class of case do not necessarily apply when the judgment of the foreign court affects matrimonial status. Accordingly, I propose for the purpose of this judgment to rely only on authorities which deal with the effect of fraud in relation to the procurement of a foreign decree of divorce.

It has been clear ever since *Bater v. Bater (orse. Lowe)*² that where the foreign decree has been procured by fraudulent evidence at trial before a court of competent jurisdiction, the courts here will none the less treat the decree as valid as long as it subsists in that foreign country. It is equally clear that where the fraud leads the foreign court to assume jurisdiction over the subject-matter of the suit, when but for that fraud it had none, then the courts in this country will treat any resulting decree as a nullity: see *Bonaparte v. Bonaparte*,³ where all possible steps were taken by the petitioner to mislead the court in Scotland into holding that he was domiciled in that country.

There is, however, no reported decision as to how the courts here should regard a foreign decision procured by fraud that does not relate either to the evidence adduced at trial nor to procuring the courts falsely to hold that it had jurisdiction to deal with the marriage contract. There are, however, a considerable number of dicta of high authority that indicate the way in which the question in the present case may be approached.

In *Shaw v. Attorney-General*,⁴ where the foreign court granted a decree to a wife whose husband was domiciled in England and who had not seen the advertisements of the petition, Lord Penzance stated that a judgment obtained in this manner⁵ "has, therefore, in addition to the want of jurisdiction the incurable vice of being contrary to natural justice, because the proceedings are ex parte and take place in the absence of the party affected by them."

In *Pemberton v. Hughes*,⁶ in which an irregularity of a foreign court which granted a decree of divorce was held not to affect its

¹ (1861) 30 L.J.Q.B. 163.² [1906] P. 209.³ [1892] P. 402; 8 T.L.R. 759.⁴ (1870) L.R. 2 P. & M. 156.⁵ Ibid. 162.⁶ [1899] 1 Ch. 781.

validity here, Lindley L.J. said ⁷: "If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, unless they offend against English views of substantial justice." And Vaughan Williams L.J. said ⁸: "The true principle seems to me to be that a judgment, whether in personam or in rem, of a superior court having jurisdiction over the person, must be treated as valid till set aside either by the court itself or by some proceeding in the nature of a writ of error, unless there has been some defect in the initiation of proceedings, or in the course of proceedings, which would make it contrary to natural justice to treat the foreign judgment as valid, as, for instance, a case where there had been not only no service of process, but no knowledge of it."

In *Bater v. Bater (orse. Lowe)* ⁹ Romer L.J. cites with approval the principle as enunciated above by Lindley L.J. In *Rudd v. Rudd* ¹⁰ Horridge J. considered that the above principles were applicable to the case before him and used them as a basis of the second ground of his decision, the position being in that case that the rules of the foreign court as to service by registered post had been bona fide followed without, however, bringing the proceedings to the respondent's notice.

It is thus clear that there is an unbroken line of statements of judges of high authority that a foreign decree of divorce obtained in proceedings the course of which ran contrary to natural justice is to be treated here as a nullity. In that respect the principles on which the courts in this country view foreign decrees in matrimonial causes is no different from that in which they view foreign judgments in personam.

Thus in *Robinson v. Fenner*, ¹¹ an action upon a foreign judgment in respect of an assigned debt, Channell J. reviewed the law as to judgments obtained contrary to our ideas of natural justice, and in conclusion stated ¹²: "The real question is the competence of the foreign court in the matter of its jurisdiction over the subject-matter of the suit and over the parties to it, and of the competence of the court in the particular suit by its having duly summoned the parties and given a hearing."

A similar view appears to have been expressed by Atkin L.J.

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⁷ [1899] 1 Ch. 781, 790.

⁸ Ibid. 796.

⁹ [1906] P. 209, 237.

¹⁰ [1924] P. 72.

¹¹ [1913] 3 K.B. 835.

¹² Ibid. 844.

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in *Jacobson v. Frachon*,¹³ a case which related to a French judgment in a sale of goods matter. Dealing with the principal point which there arose the report of what Atkin L.J. said with regard to that French judgment reads as follows¹⁴: "It could only be "impeached if the proceedings, the method by which the court "came to its final decision, were 'contrary to the principles of "natural justice'—principles which were not always easy to "define, or to invite everybody to agree about. Those principles "seemed to him (his Lordship) to involve, first, that the court, "being a court of competent jurisdiction, had given notice to the "litigant that they were about to proceed to determine the case, "and, secondly, that he should be afforded an opportunity of "substantially presenting his case before the court."

Failure of natural justice in the course of proceedings of a foreign court may thus be said to go to the root of its competence in a manner similar to absence of jurisdiction over the subject-matter before it.

Further, it is also clear that up to 1924, at any rate, it was the consistent judicial view that where the respondent in a matrimonial cause had no notice of the proceedings of the foreign court, it necessarily followed that the courts in this country would treat the resulting decree as having been procured in proceedings which were contrary to natural justice. The difficulty, however, arises that there is no decision of the courts of this country where absence of such a notice has on the facts been held to be the sole ground for so treating a decree of divorce, and that there have been at any rate three decisions of courts of first instance since 1949 in which such decrees have been held valid despite that absence of notice: *Boettcher v. Boettcher*,¹⁵ *Maher v. Maher*,¹⁶ and *Igra v. Igra*.¹⁷ In *Maher v. Maher*¹⁸ Barnard J. expressly disapproved of the application by Horridge J. in *Rudd v. Rudd*¹⁹ to the facts of that particular case of the principle that foreign decrees secured by proceedings contrary to natural justice should invariably be treated here as a nullity. In each of those three cases, however, it was either held or assumed that the foreign court had acted in accordance with their own rules relating to substituted service or to the dispensing of service.

In the light of the above-cited authorities I consider that the issue for decision in the present case must nowadays be

¹³ (1927) 44 T.L.R. 103.¹⁴ Ibid. 105.¹⁵ [1949] W.N. 83.¹⁶ [1951] P. 342.¹⁷ [1951] P. 404.¹⁸ [1951] P. 342.¹⁹ [1924] P. 72.

approached on the following basis. First, a decree of divorce pronounced by a foreign court of competent jurisdiction is treated as a nullity by the courts of this country if obtained as a result of proceedings which took a course contrary to natural justice. I use the word "treated" as a nullity because to my mind it is not necessary to show either that the decree is in its particular circumstances regarded by the law of the foreign court as void as opposed to voidable or that the decree if obtained in parallel circumstances in this country would here be regarded as void as opposed to voidable. Secondly, where the respondent has had no notice of the proceedings, the decree is *prima facie* one obtained by a procedure contrary to natural justice. Thirdly, that where it is proved to be the case or where it can be assumed to be the case that upon information *bona fide* given to it the foreign court has held that its own rules as to service or substituted service have been duly complied with, and that it is despite that fact that no notice of the proceedings has been received by the respondent, then the courts of this country, by way of exception, will not generally regard that absence of notice as resulting in the foreign court's proceedings being contrary to natural justice. (I use the word "generally" because in each of the three cases cited above the rules of the foreign court as to substituted service appear to have been of the same type as our own, and there has not yet fallen for consideration the—I hope unlikely—position of the rules of the foreign court themselves being repugnant to our views here of natural justice.)

In the present case the absence of notice of proceedings was procured by the fraud of the husband and does not fall within the above exception created by the three recent cases. Nor is there any reason whatsoever why there should not be here applied the rule that *prima facie* such absence of notice results in the proceedings being contrary to natural justice. It is a case where the husband deliberately set out to procure that natural justice should not obtain, succeeded in what he sought to do, and has created the conditions in which it is right to hold, as I do, that the decree of the court of Wyoming must be treated as a nullity here.

I would add that I have had due regard for, and appreciate the force of, that general statement by Pearce J. at the conclusion of *Igra v. Igra*,²⁰ where the phrases applicable to the present case are: "It has long been accepted that the court of the

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²⁰ [1951] P. 404, 412; [1951] 2 T.L.R. 670.

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“domicile is the proper tribunal to dissolve a marriage. Its decisions should, as far as reasonably possible, be acknowledged by other countries in the interests of comity. Different countries have different personal laws, different standards of justice and different practice. The interests of comity are not served if one country is too eager to criticize the standards of another country or too reluctant to recognize decrees that are valid by the law of the domicile.” I have considered it in relation to the fact that the present decision results in the second marriage of the husband being a nullity in this country, whilst in the State of Colorado it will, according to the expert evidence before me, be held to be valid, at any rate unless and until there are further proceedings in Wyoming. Where, however, a spouse resorts to fraud of the particular type now in question, it seems wholly unreasonable that the respondent should be bound by the resulting decree. Further, in matrimonial jurisdiction the dangers inherent in any system of substituted service are in the best of circumstances sufficiently great, and it seems wrong to allow a multiplication of those dangers by permitting them to become a potential vehicle of fraud in the field of international private law.

Again, if it be urged that the court could not unreasonably say to a wife that she should go to the United States to have this fraudulent decree set aside, one is entitled to have in mind not merely the present case but others which may arise in varying circumstances. Often, if I may respectfully adopt the phraseology of Lord Evershed M.R. in *Wood v. Wood*,²¹ it would be a cynical disregard of realities to suggest that a wife should make her way to the courts of the United States or maybe to even some more distant place to seek a remedy for her husband's fraud.

Accordingly, I hold that the decree of the district court of Wyoming is to be treated in the present proceedings as a nullity, that these present proceedings should be accordingly dealt with on the footing that the marriage of October, 1930, subsists despite the above decree, and that the wife having proved adultery on the part of the husband should be granted a decree of divorce accordingly.

Decree nisi of divorce.

Solicitors: *Bower, Cotton & Bower; The Queen's Proctor.*

J. B. G.

²¹ [1957] P. 254, 281-282; [1957] 2 All E.R. 14.

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Nov. 29.

Hodson and
Morris L.JJ.

Husband and Wife—Property—Matrimonial home—Divorce—Injunction—Petition pending—Matrimonial home owned by wife—Wife's application for injunction restraining husband from remaining in house—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 12.

Husband and Wife—Divorce—Injunction.

A wife who had filed and served on her husband a petition for divorce on the ground of alleged cruelty, which the husband by his answer denied, applied for an injunction restraining the husband from living in or remaining with her in the matrimonial home, which was her property. The parties had been living together under the same roof, the husband was disputing the wife's allegations. Wallington J. refused the application. On appeal:—

Held, (1) that section 12 of the Married Women's Property Act, 1882,¹ did not entitle a wife as of right to exclude her husband from her property.

Symonds v. Hallett (1883) 24 Ch.D. 346 considered.

(2) That although, where the circumstances justified it, the judge might exercise his discretion by granting an injunction, there were no circumstances in the present case which would warrant the court interfering with Wallington J.'s exercise of his discretion.

Decision of Wallington J. affirmed.

APPEAL from Wallington J.

On September 4, 1957, the wife, Sonja Gorulnick, filed and served on her husband a petition for divorce on the ground of his cruelty. The husband, Sidney Gorulnick, in his answer, denied the allegation. On October 9, while the hearing of the petition was still pending, the wife applied to Wallington J. for an injunction restraining the husband from living in or remaining with her in the matrimonial home, 7, Wren Avenue, London, N.W., a house owned by her. The application was refused and she now appealed. Counsel on her behalf said that she was afraid of her husband and also desired to protect herself from a possible allegation of condonation, which in the case of a woman living alone with her husband in a house would be very difficult to meet.

¹ Married Women's Property Act, 1882, s. 12: "Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso herein after contained) the same remedies

"and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. . . ."

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Gerald Gardiner Q.C. and *Eric Myers* for the wife. The practical question is which of the two parties should occupy the matrimonial home pending the hearing and determination of the wife's petition for divorce. The matrimonial home is owned by the wife, who asks for a decree dissolving the marriage on the ground of alleged cruelty; but, in the absence of an injunction restraining the husband from entering the home, the wife will be compelled to leave the home for two reasons: (1) she is afraid of her husband, and (2) she needs to protect herself against a possible allegation of condonation, which, in the case of a woman living alone with a man in a house, is an allegation very difficult to meet. The granting of an injunction is a matter of discretion for the judge, but there appears to be no reported case in which the court's order has resulted in a married woman being turned out of her own property so that her husband may live rent free in her house. It is the husband's duty to maintain the wife and not the wife's duty to maintain the husband. The wife has a right to be in the matrimonial home while a petition is pending. She has a right to sell the matrimonial home, if it is her separate property, but if the husband remains in occupation she cannot sell it with vacant possession. [The following cases, in addition to those cited in the judgments, were referred to: *Weldon v. De Bathe*,² *Larner v. Larner*³ and *Boyt v. Boyt*.⁴]

K. Bruce Campbell, for the husband, was not called on.

HODSON L.J. This is an appeal from an order of Wallington J. dated October 9, 1957. The application was by the wife, who had presented a petition for divorce on the ground of cruelty, for an injunction restraining her husband from living in or remaining with her in the house, 7, Wren Avenue, which belonged to the wife. The petition is dated September 4, 1957, and an answer has been put in by the husband denying that he has been cruel to his wife. Affidavits have been sworn both by the wife and the husband and also by a doctor, who has sworn that what the wife says in her affidavit and in her petition is consistent with the condition of health which she, the doctor, found and might fairly be attributed to the husband's conduct. But the issue of cruelty has yet to be decided, and it is not contended that this court can arrive on this interlocutory application at any conclusion as to the merits of the case. Mr. Gardiner, on behalf of the wife, has

² (1884) 14 Q.B.D. 339; 1 T.L.R. 171.

³ [1905] 2 K.B. 539; 21 T.L.R. 637.

⁴ [1948] 2 All E.R. 486.

not shrunk from contending that as a matter of law, the house being the wife's house and not the husband's, she is entitled to come to the court and ask for an order restraining the husband from entering it.

The first case to which we were referred is a decision of the Court of Appeal—*Symonds v. Hallett*.¹ In that case the husband and wife had been physically apart for some time. The husband, having had proceedings instituted against him for divorce or judicial separation, claimed the right to go into and to use the wife's house when and as he thought fit, not for the purpose of consorting with his wife but for his own purposes; and an interim injunction having been granted by Chitty J., there was an appeal to the Court of Appeal by the husband. Cotton L.J. by his judgment showed that the problem was regarded by him as a troublesome one and that he was very reluctant to be taken as saying that the husband, in circumstances such as those, was in the position of a stranger and as such could be excluded from the wife's house.

He said²: "Expressions have been used that she is entitled to be there in all respects as a feme sole and to be protected against her husband's acts as if he were a stranger. That is very true as regards the property. But is the husband to be considered a stranger because the property is vested in her for her separate use? That is a point which those who assert that the husband is to be considered a stranger must prove." On the facts of that case he was of the opinion that the husband could not be considered as desiring to use or to enter the house as a husband, to enjoy the society of his wife or to consort with his wife, and therefore he held that an injunction could stand.

Bowen L.J.—who was of the same opinion—said in those particular circumstances that he thought the injunction could stand: "For this reason: the husband is not really asking for the benefit of the wife's society; he has no wish for that. The true effect of the affidavit, if you look at it, is this, that he complains of not being allowed the proprietary use of the house."³ Therefore the Lord Justice thought it was more convenient in those circumstances, the wife being clearly entitled to the house, that the injunction should stand.

A later decision of the Court of Appeal, which is often referred to in this class of case, was *Shipman v. Shipman*.⁴ In that case

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¹ (1883) 24 Ch.D. 346.² Ibid. 351.³ Ibid. 353.⁴ [1924] 2 Ch. 140; 40 T.L.R. 483.

C. A. there was no petition for divorce or judicial separation pending.
 1957 The wife, who owned the house and was anxious to make a living
 GORULNICK out of it by taking in lodgers, and who said she had been ill-
 v. treated by her husband, succeeded before Russell J. in obtaining
 GORULNICK. an interim injunction restraining her husband from entering the
 Hodson L.J. house or interfering with her possession. There, again, the same
 problem arose. *Symonds v. Hallett*⁵ was referred to, and with-
 out reading the judgments it is clear, to my mind, that the
 members of the court were of opinion that on the true construc-
 tion of section 12 of the Married Women's Property Act, 1882, the
 husband could not be properly treated, notwithstanding the wide
 language of the Act, as if he had been a stranger, having regard
 to the special relationship which exists between husband and wife
 in that they have a duty to live together. Nevertheless, all the
 members of the court were agreed that the injunction should
 stand. Atkin L.J. and also Sir Ernest Pollock M.R. referred to
 the fact that substantial acts of cruelty were established, even
 although only by affidavit, against the husband because of the
 admissions that he had made, and therefore they were not
 disposed to accept the argument, which is always addressed to
 the court in these cases, that to accede to such an application is
 tantamount to pronouncing a decree of separation between the
 parties for the time being. On the facts of the case it was held
 that the judge had exercised his discretion rightly. Sargant L.J.
 pointed out that the remedy was a special remedy, a discretionary
 remedy⁶: "The husband's conduct has been such that he has
 " apparently lost the right to the matrimonial consortium, and
 " therefore he is in no better position than a stranger, and it
 " follows that the injunction was rightly granted." Atkin L.J.
 referred to the strength of the case against the husband from the
 point of view of admitted violence and did not emphasize the
 need for protection of the wife's business, a business which she
 proposed to carry on of taking in lodgers and had carried on
 previously for some years in the house which she owned.

I am satisfied that nothing in section 12 enables the wife as
 of right to exclude her husband from her property; nor is the
 position different when she has presented a petition. The petition
 not having been heard, but pending, must for the purpose of this
 appeal be regarded as a bona fide petition in which the wife is
 claiming the relief of the court on the ground which she states.
 The court has also to take into account the fact that the petition
 is being disputed by the husband, who is denying the allegations,

⁵ 24 Ch.D. 346.

⁶ [1924] 2 Ch. 147.

and there is a conflict of evidence which cannot now be resolved. The fact is that now and at all material times the parties have been living together under the same roof, the roof being the wife's roof, and the husband has refused to go. In such a situation it cannot be doubted that the court has a discretion to intervene and has often done so in the past, notwithstanding the fact that it cannot arrive at any conclusion upon the issue of cruelty.

Many instances can be given where the court would naturally intervene; if, for instance, there was difficulty in the way of the sale of the house; and illustrations can be found in the reported cases which Mr. Gardiner referred to, cases where a successful application has been made by one spouse to exclude the other spouse from the matrimonial home, where the court has thought that the status quo should be maintained; cases, for example, where the husband has left the home before the proceedings were instituted and has come back to the home which was the matrimonial home and belonged to the wife, perhaps as a tactical move with a view to defeating the wife's claim, or to place himself, he thought, in a more advantageous position as opposed to her. But that is not this case. This is a case where the parties have continued to live under the same roof; there has been on the facts as established no absence for any substantial length of time from the house by the husband; no question of the husband having gone away and lived somewhere else and having attempted to come back to the house in order to put himself in a position in which he is or may be thought to be wrongly disturbing the status quo.

The circumstances which I have stated were considered by the judge, who, in the exercise of his discretion, decided that it was not a case in which he ought to intervene by injunction; it is not contended here that he took into account matters which he ought not to have taken into account in exercising his discretion or left out of account matters which he ought to have taken into account, such, for example, as the prospect of reconciliation or the likelihood that there would never be a reconciliation. The wife, on the one hand, has contended throughout that she is in all circumstances determined never to live with her husband again. The husband takes the contrary view. The argument has been put forward on the part of the wife that unless her application is granted the effect will be to force her to live in the house while her petition is pending or to leave; it is said that if she is not to obtain relief by way of injunction she will have to leave, and that by resisting the application or requesting to live in the house the

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C. A. husband is putting pressure upon her to leave the house. I do
 1957 not myself think it right to arrive at that conclusion.

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There have been two decisions of Pearce J.—*Silverstone v. Silverstone*⁷ and *Teakle v. Teakle*⁸—where the husband had been away from home in circumstances which are not altogether clear from the statement of facts and had returned home at or about the time when proceedings were instituted, and the judge took the view, on the facts of those cases, that there was, in effect, pressure exercised by the husband on the wife to leave the matrimonial home. *Silverstone v. Silverstone*⁹ was an extreme case because the home was actually the flat of the husband and the wife had no proprietary interest in the property at all. But without in any way seeking to cut down the discretion of the court to make an appropriate order in the right case, which may involve one spouse ceasing to live under the same roof as the other, I do not see any circumstances in the present case which would warrant this court in interfering with the exercise of the discretion by the judge who refused to make such an order.

I think the appeal fails and should be dismissed.

MORRIS L.J. I agree. Mr. Gardiner does not put the case of the wife as being based entirely upon her ownership of the house. What he says is that the wife is desirous of having an injunction for two reasons: first, because she is afraid of her husband, and, secondly, to protect her from the risk of its being said in the proceedings that there had been condonation. Mr. Gardiner points to a conflict of fact shown by the two affidavits. The husband says that intercourse took place at the end of August, 1957; the wife says that intercourse last took place in August, 1956. So it is submitted that the wife would be gravely embarrassed for those two reasons if she were under the same roof as her husband. It seems to me, therefore, that this case is not based upon the wife's proprietary rights.

A wife's proprietary rights must clearly in some cases be protected. In *Symonds v. Hallett*¹⁰ a leasehold house was settled upon the usual trusts for the wife for life and for her separate use, and certain articles such as furniture and plate were also held upon trust for her. The husband and wife lived in the house together for some time. They then ceased to cohabit. The wife

⁷ [1953] P. 174; [1953] 1 All E.R. 556.

⁹ [1953] P. 174.

¹⁰ 24 Ch.D. 346.

⁸ [1950] W.N. 452; 66 T.L.R. (Pt. 2) 588.

began proceedings for divorce. Then the wife commenced an action in the Chancery Division claiming administration of the trusts of the settlement, and she claimed an injunction. An interim injunction was granted by Chitty J. on the motion of the wife to restrain her husband from entering upon or taking or continuing in possession of the leasehold house and from removing articles of furniture or plate from it. The wife deposed that the husband had for about 12 months ceased to reside at the house but went there usually on Thursdays and Fridays and slept one night a week; and she said that he had already taken away some of the settled plate, furniture, chattels and effects. When Cotton L.J. agreed in dismissing the husband's appeal against the interim injunction he said ¹¹: "I concur in the view that this injunction ought not to be discharged, on this ground, that, looking at the circumstances of the case and at the facts which we have before us, and the affidavit of the husband, he cannot be considered as desiring to use or to enter this house as a husband, to enjoy the society of his wife, or to consort with her as his wife. Therefore although I must not, by concurring in the view that this injunction shall stand, be considered as in any way favouring the view of it which has been urged in the argument, yet I think that under the circumstances the best course till the hearing of the case, when the matter can be decided, is not to discharge the injunction which has been granted." It seems to me that there was a clear separation there between the wife's proprietary rights and the matrimonial position: it was said that the husband had voluntarily for some time abandoned his privilege of consorting with his wife.

Approaching the matter on the basis on which Mr. Gardiner has made his submissions, it seems to me that this case does not therefore depend on the fact that the wife is the owner of the house. I agree entirely that the court has wide powers, pending the hearing of a petition, to make orders that seem right, sometimes to preserve the interim position, and sometimes to make orders which will have the effect of restraining the right of one spouse to live under the same roof as the other. But in the present case it does not seem to me that the judge would have been warranted in granting an injunction.

It would be sufficient to dispose of this appeal to say that it is not shown that the judge in any way erred in the exercise of his discretion. But I think, further, that here is a case in which

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¹¹ 24 Ch.D. 346, 351.

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the husband has not in fact left the matrimonial home (which was a feature which existed in so many of the cases to which we have been referred), but here is a case in which the husband denies the allegations against him and a case in which it is not possible, I think, for the court to form any view until the matters in dispute can be heard and determined. It does not seem to me that this is a case in which the court would have been warranted in granting an injunction which would force the husband to leave what has been the matrimonial home.

Appeal dismissed.

Solicitors: *Howard Kennedy & Co.; Franks, Charlesly & Leighton.*

A. W. G.

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June 24,
25, 26;
July 11.

Sachs J.

TURSI v. TURSI.

Husband and Wife—Divorce—Residence—Wife's petition based on three years' residence—Petition on ground of desertion—Domicile in Italy—Previous Italian decree of judicial separation—Effect of on husband's desertion—Matrimonial Causes Act, 1950 (14 Geo. 6, c. 25), ss. 7 (3) and 18 (1) (b).

Husband and Wife—Judicial separation. Husband and Wife—Desertion—Termination.

A wife who was, at all material times, domiciled in Italy obtained in the Italian courts in 1947 a decree of judicial separation on the grounds of the husband's desertion since 1942 and his cruelty. The decree corresponded in general to an English decree of judicial separation. Thereafter, the parties never lived together. In 1955 the wife filed a petition for divorce on the ground of the husband's desertion for the purpose of which, having lived in England since 1949, she invoked the jurisdiction of the court under section 18 (1) (b) of the Matrimonial Causes Act, 1950¹:—

¹ Matrimonial Causes Act, 1950, s. 7 (3): "... a period of desertion immediately preceding the institution of proceedings for a decree of judicial separation or an order under the" (Summary Jurisdiction (Separation and Maintenance) Acts) "having the effect of such a decree shall, if . . . the decree . . . has been continuously in force since the granting thereof, be deemed

"immediately to precede the presentation of the petition for divorce."

S. 18 (1): "Without prejudice to any jurisdiction exercisable by the court apart from this section, the court shall by virtue of this section have jurisdiction to entertain proceedings by a wife in any of the following cases, notwithstanding that the husband is not domiciled in England, that is to

Held, (1) that the Italian decree was a final order of the court of the domicile regulating personal rights and obligations consistent with the existence of the status of marriage and should, on the grounds of both principle and convenience, be recognized by the English courts.

Ainslie v. Ainslie (1926) 26 S.R.(N.S.W.) 567; (1927) 39 C.L.R. 381 applied.

(2) That (a) according to the rule in *Harriman v. Harriman* [1909] P. 123; 25 T.L.R. 291, the Italian decree prevented as from its date the continuance of the husband's desertion; (b) upon the enactment of far-reaching changes in the courts' jurisdiction, such as that introduced by section 18 (1) (b) of the Matrimonial Causes Act, 1950, the court in appropriate instances, of which the present case was one, might construe the provisions of the relevant statute as a new whole; (c) section 7 (3) of the Act of 1950 was, therefore, to be interpreted in the light of the jurisdiction conferred by the statute as a whole, and the words "a decree of judicial separation" included decrees pronounced by the courts of a foreign domicile, and accordingly covered the Italian decree; (d) the husband having been in desertion for three years immediately preceding that decree, the marriage should be dissolved.

Harriman v. Harriman [1909] P. 123; 25 T.L.R. 291; *Food Controller v. Cork* [1923] A.C. 647; 39 T.L.R. 699 and *In re Winget Ltd.* [1924] 1 Ch. 550; 40 T.L.R. 438 applied.

UNDEFENDED PETITION.

Both the husband and the wife were Italian by birth and, save that the wife resided in England from 1949, both lived consistently in Italy where they were domiciled. From 1932 onwards, for a period of about 10 years, they lived together from time to time. An illegitimate son was born to them in March, 1933, and this was the commencement of the longest period that they cohabited—a matter of three years. Thereafter, until January, 1942, the periods when they lived apart were greater than those when they lived together. On January 19, 1942, they married in accordance with the rites of the Roman Catholic Church at a Parish Church in the City of Rome. After some three weeks, however, the husband left the wife and did not return for four months. On his return the parties lived together for three or four weeks: and then in mid-1942 the husband once more went away. After that the parties never lived together and the wife had only on one occasion since seen the husband. There was no

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"say— . . . (b) in the case of proceedings for divorce or nullity of marriage, if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the

"commencement of the proceedings
"and the husband is not domiciled
"in any other part of the United
"Kingdom or in the Channel Islands
"or the Isle of Man."

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doubt but that the husband, when leaving the wife on the second occasion in 1942, deserted her.

In June, 1944, the wife, whilst still in Italy, met one Stavinski, whom she stated in evidence was an officer in the 8th Army. Not long afterwards she commenced to commit adultery with him. In October, 1946, she commenced proceedings against her husband under the appropriate sections of the Italian Civil Code to obtain a judicial separation. After certain adjournments for the purposes of reconciliation, that petition was heard on June 9, 1947, the husband having entered no appearance nor taken any step to take advantage of the reconciliation opportunities which the court offered. The cause was heard by three judges of the Civil Tribunal of Rome, who exercised the equivalent in matrimonial matters of a High Court jurisdiction at first instance (there was in Italy no other court of first instance dealing with such matters which had a higher status). After hearing evidence and the argument addressed on behalf of the petitioner and of the public attorney, the court acceded to the petition and made a decree pronouncing for the separation of husband and wife on account of the guilt of the husband, namely, desertion and cruelty, gave the custody of the son to the wife, condemned the husband in certain costs, but made no provision for maintenance by the husband of the wife who had specifically waived any right thereto. The husband continued to keep away from his wife after the decree, just as he had for the four preceding years, and it was found, as a fact, in the course of the present hearing, that the husband's continuing absence from his wife after the decree was due to his continuing intention to desert her and was in no way influenced by the pronouncement or continuing existence of the decree.

The wife, in her evidence in the present proceedings, stated that the only reason she asked for a decree was to enable her son and herself to obtain passports to leave Italy, and her evidence on that point was accepted as being true. At the hearing of the proceedings for a judicial separation she did not disclose her own adultery with Stavinski, nor in Italian law was it necessary for her so to do: adultery being, in Italy, a criminal offence but not a bar to an application for judicial separation.

At some date in 1947 Stavinski left Italy and came to England. In 1949 the wife followed him and once more committed adultery with him. At that time she had abandoned any idea that her husband might return to live with her and she wished to marry Stavinski. Later they started to live together

as man and wife; they continued so to do at the date of the hearing and desired to marry if free to do so.

On June 15, 1955, the wife, availing herself of the jurisdiction of the court under section 18 (1) (b) of the Matrimonial Causes Act, 1950, to grant her a decree of divorce filed a petition solely on the ground of the husband's desertion.

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George Dobry for the wife. In deciding the issue in this case, namely, whether the husband deserted the wife in 1946, the court is not bound to have regard to the decree of judicial separation pronounced by the Italian court. That decree could have been discharged at any time by the parties becoming reconciled; it was not, therefore, a final and conclusive judgment: *Nouvion v. Freeman*.² In any event, even if the decree be held to be final and conclusive, the recognition to which it is entitled in this country is not necessarily absolute. The weight and effect to be given by the courts of this country to a foreign judgment, which is only one of the facts before the court, must always depend upon the circumstances of each particular case: *McKee v. McKee*.³

Further, even if the decree be final and conclusive, it is not one which should be recognized in this country. The recognition of decrees of divorce granted by the courts of a foreign domicile is based upon the well-established rule that the law of the domicile properly regulates matters of status. But a decree of judicial separation is not a matter affecting status: *Anghinelli v. Anghinelli*.⁴ It is for this reason that the courts have jurisdiction to grant decrees of judicial separation based on residence and not domicile (see *Armytage v. Armytage* ⁵), for a suit for a judicial separation is merely a personal action and the rule is that the courts of the place of residence have jurisdiction over personal actions: *Sirdar Gurydal Singh v. Rajah of Faridkote*.⁶ Researches have disclosed no case in which a foreign decree of judicial separation has been recognized in this country, and it is submitted that this is not a matter of chance but for the reason set out above. If one has regard to the question of convenience, it is clearly very unsatisfactory that parties who have been the subject of a decree of judicial separation in the country of their domicile, for example, Italy, where divorce is not recognized, should be condemned to be regarded by the law of any country in which

² (1889) 15 App.Cas. 1.

⁴ [1918] P. 247, 254, 256; 34

³ [1951] A.C. 352; [1951] 1 T.L.R. 438.

T.L.R. 438.

755; [1951] 1 All E.R. 942.

⁵ [1898] P. 178; 14 T.L.R. 480.

⁶ [1894] A.C. 670; 10 T.L.R. 621.

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they might happen to be as in an indeterminate state of neither married nor unmarried.

If, contrary to the previous submissions, it be held that the Italian decree of judicial separation is one of which recognition should be granted by the English courts, it is submitted that it is nevertheless open to this court to hold that the respondent is in desertion. *Harriman v. Harriman*⁷ is generally regarded as having established the proposition that a separation order brings desertion to an end, but if the individual judgments of the court are considered it is found that three out of the six Lord Justices apparently took the view that if the husband had remained absent from the wife, not merely on account of the separation order but because of an intention to desert, he might have been held guilty of desertion. It is submitted, therefore, that it is open to this court to hold that the husband in the circumstances of this case intended to desert the wife and that his desertion continued irrespective of the making of the Italian decree.

In the alternative, the wording of section 7 (3) of the Matrimonial Causes Act, 1950, in default of express words of exclusion, applies to foreign decrees of judicial separation as well as to those granted by the English courts. Since the husband was in desertion for three years preceding the granting of that decree, the wife is entitled to the decree nisi which she now seeks.

James Comyn for the Queen's Proctor. The Italian decree of judicial separation in the present case was enforceable unless and until it was rescinded upon a reconciliation taking place. It was, therefore, final and conclusive. It was submitted on behalf of the wife that the Italian decree should not be recognized by the courts of this country, since a judicial separation does not affect the status of the parties. A decree of judicial separation is a matter affecting status and it is to be noted that Atkin L.J., in his judgment in *Eustace v. Eustace*,⁸ specifically adverts to this point, remarking⁹ that sections 25 and 26 of the Matrimonial Causes Act, 1857, clearly show that the granting of such a decree affected the status of the wife, who was, thereafter, to be regarded for certain purposes as a feme sole. It is submitted, therefore, that the Italian decree affected the status of the parties, and, indeed, it would be strange if it were not so, for unless a marriage be void or voidable, there is no other process, according to the law of Italy, which can affect the matrimonial status.

On the question of convenience, it is in the interest of the

⁷ [1909] P. 123; 25 T.L.R. 291.

⁹ [1924] P. 45, 54.

⁸ [1924] P. 45; 39 T.L.R. 687.

parties that a decree of judicial separation granted in the country of their domicile should be recognized by other countries in which they may reside. Thus, at least, they have the advantage of consistency and their status is established and not liable to fluctuate according to the law of any country in which they may be temporarily resident.

On all these grounds the Italian decree of judicial separation is a final decree affecting status which should be recognized by the English courts, and *Ainslie v. Ainslie*,¹⁰ although only of persuasive authority, was correctly decided and should be followed. It is conceded that there appears to be no previously reported authority in which a foreign decree of judicial separation has been recognized in England, but this is explicable by the fact that before 1949 the occasion to do so would not have arisen. In view of this change in the law, an amendment of rule 4 of the Matrimonial Causes Rules, 1957, to include the citation of foreign decrees in petitions might be desirable.

If the Italian decree is to be recognized in the English courts it must be recognized for all purposes. If that be so, then *Harriman v. Harriman*¹¹ applies—the submission for the wife as to the alternative interpretation to be put upon that decision was considered and rejected in *Robinson v. Robinson*¹²—and the decree terminated the husband's desertion. Alternatively, if it be held that *Harriman v. Harriman*¹³ has been wrongly interpreted, by seeking and obtaining a decree of judicial separation the wife consented to live apart from her husband: *Joseph v. Joseph*.¹⁴

The provisions of section 7 (3) of the Matrimonial Causes Act, 1950, were first enacted in section 6 (3) of the Act of 1937. While it is conceded that, on the bare wording of the section, it is open to the court to hold that the words "a decree of judicial separation" include a decree granted by the courts of a foreign domicile, it is submitted that such an intention could not be attributed to the legislature in 1937. Moreover, it is of assistance in interpreting a certain phrase in a statute to see in what sense the same phrase has been used in other sections of the same statute. The words "judicial separation" as used in section 21 of the Act of 1950 are clearly intended to refer only to English decrees. It is submitted, therefore, that the true construction

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¹⁰ (1926) 26 S.R.(N.S.W.) 567;
(1927) 39 C.L.R. 81.

¹¹ [1909] P. 123.

¹² [1919] P. 352; 35 T.L.R. 637.

¹³ [1909] P. 123.

¹⁴ [1953] 1 W.L.R. 1182; [1953]
2 All E.R. 710.

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of section 7 (3) is the restricted one and the decree sought should not be granted.

Cur. adv. vult.

July 10. SACHS J., reading his judgment, stated the facts and continued: Upon these facts there falls for decision yet another of the problems arising by virtue of the incidence of section 18 (1) (b) of the Matrimonial Causes Act, 1950, the immediate successor of section 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1949. That subsection, or to be exact, its predecessor, produced a departure of a far-reaching nature from the broadly based concept that jurisdiction in divorce depends on the domicile of the parties: and incidentally it has in many countries not unnaturally attracted the criticism of those concerned with the application of private international law to marriages. It provides that women of all countries can, after three years' residence here, obtain a divorce under the law of this country irrespective of their domicile and irrespective of the fact that their husbands have never visited this country and have never had the remotest link with it. Its provisions are thus calculated to attract to this country women who have been born, brought up, married and lived in the country of their husband's domicile, and to whom continued application of the matrimonial law of that country might not seem unduly unreasonable. It lays down that the courts of this country are thus to give decrees of divorce that, as in the present case, would not necessarily be recognized in the country of domicile, and may also not be recognized in many other civilized countries. These matters are so clear that it must be taken by the courts that the legislature intended them, and that the problems arising under the above subsection should be considered in the light of that intention.

Before dealing with the real points upon which this case turns, I should refer in more detail to the nature of the Italian decree. It is one which is referred to in the courts there as a "separazione legale": it was granted to the wife on account of the guilt of the husband, that guilt consisting, according to the tenor of the decree, of desertion and cruelty: its effect is that as from its date neither party is compelled to live with the other: it can be brought to an end by the parties becoming reconciled: but it cannot be rescinded by unilateral action on either side. In all its essentials it coincides closely with the old ecclesiastical divorce *a mensa et thoro* by which the parties were decreed and

declared "to be divorced and separated from bed, board and "mutual cohabitation . . . until they shall be reconciled to each "other." It accordingly corresponds with considerable exactitude to a decree of judicial separation as pronounced by the courts in this country.

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At one stage it was argued on behalf of the wife that the Italian decree was not a final order by reason of the possibility that it might become discharged at a later time. As that argument was only lightly pressed, it is sufficient to state that I respectfully adopt the view of Isaacs J. (who later first became Chief Justice of and then Governor-General of the Dominion of Australia) in *Ainslie v. Ainslie*,¹ where in regard to the test as to whether a judgment is final he states²: "The true rule is to see "whether or not the legislature has by its enactment left the "order entirely floating, so to speak, as a determination enforce- "able only as expressly provided and in the course of that "enforcement subject to revision, or whether the order has been "given the effect of finality unless subsequently altered." Add to that passage the words "or rescinded," as it is clear from the context was intended by him, and that rule plainly results in the Italian court's order being a final one.

The first point of substance to be decided is whether the courts of this country, in matrimonial proceedings brought by virtue of section 18 (1) (b), recognize as effective a decree of judicial separation properly pronounced by the domiciliary court, when the wife has been resident in this country three years, but the husband remains domiciled in the country which pronounced the decree. There is no decision of the courts here on this point, but in Australia the courts have had to consider a similar problem in a case in which both husband and wife had become domiciled in the State in which proceedings were pending. That case is distinguishable from the present one firstly, in that the husband there had changed his domicile and both he and his wife were resident in the same State, New South Wales, and, secondly, because it deals with the effect of a decision of a court of petty sessions of the State of their previous domicile, Western Australia, and not with that of the High Court. But each of those distinctions made the case one where the arguments for extra-territorial recognition were weaker than in the present instance.

In that case, *Ainslie v. Ainslie*,³ the proceedings came before

¹ (1927) 39 C.L.R. 381.

² Ibid. 390.

³ (1926) 26 S.R.(N.S.W.) 567;
(1927) 39 C.L.R. 381.

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a judge of first instance of the State of New South Wales, the Court of Appeal of New South Wales,⁴ and the High Court of Australia.⁵ Of the 11 judges who gave their views on whether or not the order of a court of petty sessions in Western Australia had extra-territorial effect, six held that it had such effect and five held that it did not. The reasoning on which the decision of the six judges was founded is best exemplified in the judgment of Isaacs J.⁶; that of the five judges who took the other view appears most clearly from the judgment of Ferguson J.⁷

The arguments considered in *Ainslie's* case⁸ and repeated here may, in substance, be divided into those which relate to general principles, and those which put forward the conveniences and inconveniences of a decision either way.

As regards principle, the main argument pressed against recognition of decrees of judicial separation outside the country of domicile in which they are granted went thus. So far the courts of this country have only accorded recognition to a foreign domiciliary decree when it affected the status of the parties: decrees of judicial separation do not affect status: accordingly, no such decrees should be here recognized. Whilst appreciating, of course, the practical distinction between those decrees that cut the bond of marriage and those that leave it subsisting, the above proposition, as stated in the way that appears to attract those who put it forward, savours to my mind somewhat of a blend of dogma and absence of precedent. It is the fact that hitherto the courts here have not accorded recognition to domiciliary decrees for judicial separation: but until now they have not been asked so to do—and, indeed, it is not surprising that before the Act of 1949 the occasion for such a request did not arise. So the argument against recognition, as thus stated, seems rather to beg the question of principle.

The argument on principle for extra-territorial recognition springs from the fact that by the almost universal view of all civilized countries a special quality attaches to the decrees of domiciliary High Courts touching any contract of marriage between persons domiciled in the country of those courts, when that contract has validly resulted in married status: and then it runs thus. It is that special quality which is “recognized” in the sense that the domiciliary decrees are treated as operative in

⁴ 26 S.R.(N.S.W.) 567.

⁵ 39 C.L.R. 381.

⁶ Ibid. 388.

⁷ 26 S.R.(N.S.W.) 574.

⁸ 39 C.L.R. 381.

other countries. The most drastic way in which a decree of a domiciliary court can affect a marriage is by dissolving it: and if recognition extends to the most drastic decree a fortiori it must cover a decree of lesser effect.

It is on the basis of this line of reasoning that is founded the passage in the judgment of Isaacs J. where he says⁹: "But if 'the law of the domicile (and I make no distinction here between 'domicile' and 'domicil') gives to a divorce a vinculo a force recognized everywhere, it must unquestionably give binding force everywhere—subject, of course, to local law to the contrary—to a judgment rendered by a court having jurisdiction both jure gentium and jure municipii, and regulating personal rights and obligations consistent with the existence of a status of marriage." Similarly, Starke J. states¹⁰: "If the forum domicilii can affect the status of the married persons it must, a fortiori, have jurisdiction to affect the personal rights of the parties arising out of that status in proceedings relating to the separation of the spouses or the restitution of their conjugal rights (Dicey, Conflict of Laws, 3rd ed., p. 296)."

I respectfully adopt the above reasoning and consider that it should be applied here, unless there is anything in the arguments as to "inconvenience" which can override its application.

Accordingly, I now turn to those points made as to the respective inconveniences which fall to be suffered according to whether the Italian decree is held to have extra-territorial effect or not. It was urged on behalf of the wife that it would be wrong where there was a foreign decree of judicial separation by a domiciliary court, that thereafter the spouses in the course of their travels through or sojourns in other countries should in effect be burdened by a notional stamp on their passports "Married, 'but . . .,'" and that their rights inter se should be thus affected in those various countries. Once outside the boundaries of the country of domicile it was argued that it was right that they should apply to the courts of each successive country in which they might come to be, for any desired relief from being obliged to live with each other. But decrees of judicial separation are in substance granted to afford protection to one spouse against the other: and it is a corollary of the above argument that, in each successive country, the wife who had secured the protecting decree of the domiciliary court would have to prove over again the facts which entitled her to protection against an assertion by the husband of marital rights. Very often the difficulties in

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⁹ 39 C.L.R. 381, 392.¹⁰ Ibid. 409.

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securing the attendance of witnesses would obviously make such a course impracticable—even if expense did not preclude it: and to my mind the need for such repeated proof would be a burden far less tolerable than any suggested in the argument against recognition. Nor in this particular case do I think it open to the wife, after having once obtained the decree, to rely on any special motives in her own mind in relation to the reasons why she obtained it and to assert that she sought it for reasons other than her own protection.

Again, it is argued that other countries may grant decrees of judicial separation on grounds that differ from those which can support a parallel claim here. Provided, however, nothing in the laws and procedure of the foreign court offends our ideas of natural justice, it seems to me that this argument should not prevail in relation to such decrees any more than it did in the even more important matter of recognition of foreign decrees of divorce.

Finally, as regards the “grounds of inconvenience” arguments adduced against extra-territorial recognition, I turn to that which at one time appeared to me the most cogent of those put forward by Ferguson J.¹¹: “No court in New South Wales “has power to set it” (the order of the petty sessional court of Western Australia) “aside, so that if it is in force here, then “however conclusively the husband—or the wife in another “case—might be able to establish his or her right to have it set “aside, it must remain in force, governing their matrimonial “relations in their new domicile, unless they are prepared to go “back for relief to the country they have quitted. In this case “that country is Western Australia; it might equally well be “America or Russia or Japan. I cannot believe that we are “bound to tell a man and wife domiciled in this country that so “far as their rights and obligations as man and wife are “concerned, they must go to the courts of a foreign country to “regulate them, although they have definitely abandoned their “domicile in that country, and owe no allegiance to its laws.”

Apart from the fact that in the present case the court is not dealing with “a man and wife domiciled in this country,” it is pertinent to observe that in *Ainslie’s* case¹² the courts were dealing with a petty sessional order capable of variation or rescission upon unilateral application of one of the parties, whilst here I am dealing with a High Court decision and one that is incapable of any such unilateral alteration or rescission. That

¹¹ 26 S.R.(N.S.W.) 577.¹² 39 C.L.R. 381.

distinction becomes all the more relevant where, as here, the court adjudicating on the recognition of a foreign domiciliary decree itself administers a law under which there is similarly no way of obtaining a variation or rescission of the decree of judicial separation on account of events subsequent to that decree. (Neither counsel for the Queen's Proctor nor counsel for the wife were able to point to any way in which in this country decrees of judicial separation could, whilst the marriage subsists, be varied or rescinded by unilateral application to the court on any ground arising from facts occurring after the decree. Determination of the decree by or upon reconciliation is a different thing: as also is the falling of the decree by virtue of a dissolution of the marriage itself.) A High Court, which after all appropriate investigation makes a decree of such finality, can hardly adopt as a ground for non-recognition of a parallel decree of a foreign High Court the fact that, after no less investigation, it makes its decree equally final. That seems in the present case to afford a complete answer to the point as put by Ferguson J.

Accordingly, I consider that the arguments as to convenience, when taken as a whole, are balanced in favour of extra-territorial recognition of the Italian decree. Further, such recognition seems to conform to the view of justice and reason stated by Lord Penzance in *Wilson v. Wilson*¹³: "Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws." Though when expressing that view he was dealing only with jurisdiction in matters of divorce, the words seem no less apt in relation to the recognition of decrees of judicial separation.

It thus seems right in principle to recognize, in the sense above considered, decrees of judicial separation pronounced by foreign domiciliary courts in cases such as the present—at any rate so long as the domicile of the parties remains unchanged. It may be added that decrees of judicial separation are granted throughout a wide range of countries where the Christian tenets prevail: that in a number of those countries, as in Italy, the only relevant decree that the courts pronounce touching a marriage contract which is neither void nor voidable is that of

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¹³ (1872) L.R. 2 P. & M. 435, 442.

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judicial separation; and that non-recognition of those decrees would mean that no decrees at all of those latter countries concerning such marriages would be here recognized.

The next point for decision is whether the decree of the Italian court, once it has been recognized, should be taken as automatically barring the wife from establishing that her husband was in desertion, or should the question whether the husband continue after the decree to be in desertion be regarded as one of fact to be decided on the evidence as a whole. This turns on a consideration of what is the true ratio decidendi of *Harriman v. Harriman*.¹⁴ That was the decision of the full Court of Appeal that separation orders in justices' courts cause a husband's desertion to cease to run—a decision from which it is, of course, a fortiori clear that decrees of judicial separation of the High Court have a like effect.

On the one hand, Fletcher Moulton L.J. said¹⁵: "It is impossible to hold that a husband is committing a marital offence by non-cohabitation when he has not the right to cohabit." On the other hand, Buckley L.J.¹⁶ put the matter as follows: "The case then stands thus—that the wife establishes that her husband has been absent by way of desertion for eight months and has remained absent after she had obtained an order that she was no longer bound to cohabit with him. He may have remained absent in obedience to the order or may have remained absent with a continuing intention to desert," and proceeds on the evidence to come to the former conclusion in the absence of evidence to the contrary.

The view put succinctly by Fletcher Moulton L.J. is the one also adopted by Farwell L.J.¹⁷ and Kennedy L.J.¹⁸ The view put forward by Buckley L.J.¹⁹ seems to be consistent with the expressions used by Cozens-Hardy M.R.²⁰ and Vaughan Williams L.J.²¹ To that extent it seemed open to me to consider whether in the present case the court could adopt what might be termed to be the "*Herod v. Herod*"²² line of approach," and treat the question of whether desertion continued after the decree as a question of fact. In 1919, however, the point fell for consideration by Horridge J. in *Robinson v. Robinson*,²³ and he came to the conclusion that this line of approach was not open—though,

¹⁴ [1909] P. 123; 25 T.L.R. 291.

¹⁵ [1909] P. 123, 137.

¹⁶ Ibid. 148.

¹⁷ Ibid. 146.

¹⁸ Ibid. 154.

¹⁹ Ibid. 148.

²⁰ Ibid. 131, 146.

²¹ Ibid. 132.

²² [1939] P. 11; 54 T.L.R. 1134; [1938] 3 All E.R. 722.

²³ [1919] P. 352; 35 T.L.R. 637.

obviously with a view to an appeal, he found that the husband's intention to desert continued. The last-named decision has now stood for something like 30 years, and it is for me in the circumstances to follow it without further considering the point—which may, however, still be open in an appellate court.

Accordingly, upon the principle stated by Vaughan Williams L.J., I hold that the Italian decree prevented, as from its date, the husband continuing to be in desertion.

In the above circumstances it is unnecessary for me to deal with the further point raised by the Queen's Proctor—that on an analogy from *Joseph v. Joseph*²⁴ the wife had, in any event, by seeking the decree of the Italian court, put herself into the position of having in effect agreed to living apart from her husband. I only pause to note that in *Joseph v. Joseph*²⁴ it seems (from what is stated in the later case of *Corbett v. Corbett*²⁵) that the *get* there in question was one to which both parties had assented: and also that, in a case such as the present, care must be taken not to confuse on the one hand a consent to separation and on the other a recognition of desertion having taken place coupled with a desire to seek the appropriate remedy.

As, under what can be called the rule in *Harriman v. Harriman*,²⁶ the Italian decree of judicial separation precludes the wife from asserting that her husband's desertion continued to run to the date of the petition, she must fail in this present cause unless she can find some statutory provision that prevents the application of that rule.

Thus arises the final point: can the wife avail herself of section 7 (3) of the 1950 Act by which in the circumstances there set out "a period of desertion immediately preceding the "institution of proceedings for a decree of judicial separation "or an order under the said Acts" (the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949) "having the "effect of such a decree shall, if . . . the decree or order has been "continuously in force since the granting thereof, be deemed "immediately to precede the presentation of the petition for "divorce." The provisions now contained in that subsection first appeared in section 6 of the Matrimonial Causes Act, 1937, and were intended to limit the operation of that part of the rule in *Harriman v. Harriman*²⁶ to which I have referred above.

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²⁴ [1953] 1 W.L.R. 1182; [1953] 2 All E.R. 710.

²⁵ [1957] 1 W.L.R. 486, 492; [1957] 1 All E.R. 621.

²⁶ [1909] P. 123.

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The question whether the words “ a decree of judicial separation ” cover the decree granted to this petitioner in Rome is the only one on which, after the conclusion of the helpful addresses of counsel, there remained any real doubt in my mind. The main argument for the wife runs as follows. If by the law of this country the wife is at the disadvantage that the Italian decree brings into operation the rule in *Harriman v. Harriman*,²⁶ it would be both absurd and unjust so to interpret section 7 (3) that she cannot have the advantage of a statutory provision intended to limit the operation of that rule. The main argument against the wife is that at the time the provisions of the first predecessor of section 7 (3) of the 1950 Act came into effect (by virtue of section 6 (3) of the 1937 Act) the words “ a decree of “ judicial separation ” in the relevant subsection would have been construed as referring only to the decrees of the High Court of this country and they must continue to be so construed. Both arguments are of powerful persuasive effect.

Counsel for the Queen’s Proctor, whilst putting forward the view that it is open to the court to give effect to either argument, submitted with some force that the more cautious and proper decision lay in adopting the narrower construction of section 7 (3) so as to exclude the Italian decree from its beneficial operation. In support of this argument for the narrower construction of section 7 (3) can be urged the fact that it comes naturally to the mind, as a matter of first impression; that in 1937 the likelihood of a foreign decree of judicial separation having to be considered by these courts was so small as not to be within the contemplation of Parliament; and that as the words “ judicial separation ” in section 21 (the successor of the feme sole provisions of section 194 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by the First Schedule to the Law Reform (Married Women and Tortfeasors) Act, 1935) seem *prima facie* to be directed solely to an English decree, it would be wrong to accept a different definition for section 7. Indeed, I am inclined to assume that in 1938 the courts would (despite section 13 of the 1937 Act) have adopted the narrower construction if the point had then come before them.

Starting with that assumption, can it be said that the position has been changed by that amendment of the court’s jurisdiction by section 1 of the 1949 Act, which for the first time gave the court jurisdiction over marriages where the husband had never been domiciled in this country?

²⁶ [1909] P. 123.

I have earlier adverted to the far-reaching nature of that change in the law, to the effects which follow, and to the fact that the legislature must have considered and recognized both the nature and effects of the change. When in a field such as is covered by the Matrimonial Causes Act, 1950, a far-reaching change in the court's jurisdiction is enacted, are thereafter the pre-existing statutory provisions in that field necessarily all to be construed in precisely the same way as when the lesser jurisdiction prevailed, or can, where appropriate, some of those provisions be given a broader interpretation in the light of the extended jurisdiction? This is a question on which I would have much preferred to have the benefit of some guiding authority: but the researches of counsel made in response to a specific request have been unable to find one. In its absence I have with diffidence—and regretting in company with Willmer J. (see *Day v. Day*²⁷) the absence of a right of appeal by the Queen's Proctor—come to the conclusion that the court may in appropriate instances, of which this seems to me one, proceed to construe the provisions of the relevant statutes as a new whole.

Some support for this approach to the above question may perhaps be found firstly in the statement (albeit referring to a different set of circumstances) of Lord Wrenbury in *Food Controller v. Cork*²⁸ when considering a consolidation Act: “ But “ I derive little, if any, assistance from the knowledge that, for “ instance, a particular section is in terms identical with a section “ which as the law previously stood was found in a framework “ different from that in which it is now found. To ascertain the “ present law it is necessary to consider such a section in the “ framework in which it now stands. In other words, I have to “ consider the statute law as it is ”—and next, to a lesser degree, in the application of that statement, again in a very different field, by Russell J. (as he then was) in *In re Winget Ltd.*²⁹

Pursuant to the above conclusion the relevant sections now in force require to be looked at as a whole with, so to speak, a post-1949 Act eye.

Provisions as to the jurisdiction of a court over subject-matter are, of course, normally to be found in the forefront of a statute, preceding those which set out the grounds on which suitors can be granted relief: but, taking the 1950 Act as it stands, it seems

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²⁷ [1957] 2 W.L.R. 683, 691; ²⁹ [1924] 1 Ch. 550, 556; 40 T.L.R. [1957] 1 All E.R. 848. 438.

²⁸ [1923] A.C. 647, 668; 39 T.L.R. 699.

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to me that the accidents of legislative history should not prevent section 18 having the same effect as if it were part of a normally positioned set of initial sections as to jurisdiction, nor should they prevent section 7 (3) being given a reasonable interpretation in the light of the jurisdiction conferred by the statute as a whole. On that basis I see no need to assume in relation to section 7 (3) that the legislature was so inadequately advised, when opening by section 18 (1) (b) the courts to those who had never been domiciled here, as not to be made aware of the chances of *Ainslie v. Ainslie*³⁰ being followed in England. Nor do I see good reason for overriding the normal presumption that the legislature does not intend to produce results so absurd or so manifestly unjust as those for which the Queen's Proctor felt constrained to argue.

For the above reasons I consider that the words "decree of "judicial separation" in section 7 (3) cover the Italian decree here under consideration. Thus, in the present case, the fact that the husband deserted the wife for the three years immediately before the date of the Italian decree is, by virtue of the above subsection, sufficient to enable her here to be granted a decree of divorce.

As to so much of the Queen's Proctor's argument as was founded on section 21 of the Act of 1950, I would add that it is not for me to decide how, in relation to international private law, the provisions of that section may or may not produce a conflict between *lex fori*, *lex rei sitae* and *lex domicilii* as regards property or its devolution. Even if in the end the words "judicial separation" and "decree of judicial separation" had to be differently construed in a section relating to property and its devolution from the same words in a section relating to the right to relief on a petition for divorce, it would not affect my view of the true construction of the latter.

In conclusion I would mention that, on behalf of the Queen's Proctor, it has been pointed out that rule 4 of the Matrimonial Causes Rules, 1957, does not make obligatory the disclosure in a petition of proceedings before a foreign court, and it has been suggested that consideration of an amendment is accordingly desirable. That suggestion seems worthy of support.

Decree nisi.

Solicitors: *E. H. Silverstone & Co.; The Queen's Proctor.*

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Husband and Wife—Divorce—Conflict of jurisdiction—Foreign decree—Recognition—Jurisdiction assumed on basis of wife's domicile—Parties at all material times domiciled in England—Wife resident for more than three years before proceedings within territory of foreign court.

Conflict of Laws—Jurisdiction—Divorce—Comity—Foreign decree granted by court other than that of domicile—Recognition.

For the recognition by the English courts of a foreign decree pronounced by a court other than that of the domicile, the assumption of jurisdiction by the foreign court on the grounds laid down by section 18 of the Matrimonial Causes Act, 1950,¹ is not essential provided that facts existed which would have enabled the English courts themselves to have assumed jurisdiction by virtue of that section.

The Swiss wife of a husband who was, at all material times, domiciled in England was in July, 1953, granted a decree of divorce in the District Court of Zurich, the court assuming jurisdiction on the basis that the wife had, in the circumstances, acquired a separate domicile from that of the husband and that her domicile was in the canton of Zurich. The wife had, in fact, lived in that canton from at least 1943 until the commencement of the proceedings in the Zurich court. On the husband's petition for a declaration that the marriage had been validly dissolved by the Swiss decree:—

Held, that, although in English law the wife retained the domicile of her husband during coverture, domicile had, on the enactment of the statutory provisions consolidated in section 18 of the Matrimonial Causes Act, 1950, ceased to be the sole basis of jurisdiction in suits for dissolution of marriage. Where, therefore, a decree was granted by a foreign court other than that of the domicile—although the court had purported to assume jurisdiction

¹ Matrimonial Causes Act, 1950, s. 18 (1): "Without prejudice to any jurisdiction exercisable by the court apart from this section, the court shall by virtue of this section have jurisdiction to entertain proceedings by a wife in any of the following cases, notwithstanding that the husband is not domiciled in England, that is to say:—
"(a) in the case of any proceedings under this Act other than proceedings for presumption of death and dissolution of marriage, if the wife has been deserted by her husband, or the husband has been deported

"from the United Kingdom . . . and the husband was immediately before the desertion or deportation domiciled in England; (b) in the case of proceedings for divorce or nullity of marriage, if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man."

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on that basis—but within whose jurisdiction the wife had, in fact, been resident for three years immediately preceding the commencement of the proceedings, the English courts would recognize that decree because they would, themselves, have accepted jurisdiction under section 18 (1) (b) of the Act of 1950 on proof of similar residence in England, and the decree of July, 1953, should be declared valid.

Dicta of Mr. Commissioner Latey in *Arnold v. Arnold* [1957] P. 237; [1957] 1 All E.R. 570 questioned.

Travers v. Holley [1953] P. 246; [1953] 2 All E.R. 794 considered.

UNDEFENDED PETITION for declaration.

The husband was of British nationality and was at all material times domiciled in England. At the time of the marriage the wife was a Swiss national, who had lived and was domiciled in the canton of Zurich from at least 1943. The marriage was validly celebrated in Zurich according to the requirements of Swiss law on December 22, 1950, the wife retaining her Swiss nationality. After a short honeymoon in Switzerland the husband returned to his duties in London, where he lived and worked. The wife agreed to join him in London after a short interval which she required to attend to her personal affairs; in fact she never did join him but thereafter lived separate and apart from the husband.

On July 22, 1951, the wife commenced proceedings in the District Court of Zurich, praying that her marriage with the husband be declared void, or alternatively, that her marriage be dissolved. The husband, through his English solicitor, disputed the jurisdiction of the Zurich court. On December 8, 1952, however, he gave evidence before one of the examiners of the High Court denying certain of the charges against him raised by the wife in the Zurich proceedings. On July 3, 1953, the Zurich court pronounced its findings together with full reasons for them. The Zurich court rejected the wife's prayer for a declaration of nullity, but granted her a decree of dissolution of her marriage with the husband under article 142 of the Swiss Civil Code on the ground that the matrimonial relations between the parties were deeply and irreparably disrupted.

On February 16, 1957, the husband presented a petition to the High Court seeking a declaration that the marriage had been validly dissolved by the Swiss decree or, alternatively, a decree of divorce on the ground of the wife's desertion. The suit came on for hearing before Karminski J. on May 20, 1957.

Dr. Speckert, a doctor of laws of the University of Zurich, gave expert evidence on Swiss law, and the following facts emerged from his evidence: In matrimonial disputes in Switzerland the substantive law was to be found in the Swiss Federal Code, though procedural law (which included questions of jurisdiction) was regulated by the law of the canton. Applying the law of the canton of Zurich, the Zurich court found that the wife had, in the circumstances of the case, acquired a domicile in Zurich by the date of the commencement of the Zurich proceedings, notwithstanding that the domicile of the husband remained English. In their judgment the Zurich court expressly noticed that by English law the domicile of the wife would remain that of the husband during coverture, notwithstanding her separation from him, but applied the provisions of the Swiss Civil Code which allowed her, as a Swiss national, to acquire a domicile separate from his.

After hearing the evidence in support of the husband's petition Karminski J. adjourned the matter for argument by the Queen's Proctor on the question of the validity of the Swiss decree.

Colin Duncan for the Queen's Proctor. Two principles govern the questions arising in this suit, namely, that, in matters of divorce, jurisdiction lies in the courts of the domicile, and that a wife has the domicile of her husband during coverture. *Le Mesurier v. Le Mesurier*,² *Rex v. Lolley*,³ *Warrender v. Warrender*,⁴ *Dolphin v. Robins*⁵ and *Shaw v. Gould*⁶ are all authority for the first proposition. Mutatis mutandis the reasoning in *Travers v. Holley*⁷ would appear to have applied equally well to *Shaw v. Gould*.⁸ Running through all these cases is to be observed the anxiety arising from the anomalous position of a wife rejected by her husband but who, for practical reasons, is unable to proceed against him in the courts of his new domicile. *Harvey (or se. Farnie) v. Farnie*⁹ was yet another authority in the same line which held that the English courts will recognize a decree granted by the courts of a foreign domicile even on grounds not recognized in England, thus partly overruling *Rex v. Lolley*.¹⁰

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² [1895] A.C. 517; 11 T.L.R. 481.

³ (1812) Russ. & Ry. 237.

⁴ (1835) 2 Cl. & Fin. 488.

⁵ (1859) 7 H.L.C. 390.

⁶ (1868) L.R. 3 H.L. 55.

⁷ [1953] P. 246; [1953] 2 All E.R. 794.

⁸ L.R. 3 H.L. 55.

⁹ (1882) 8 App.Cas. 43.

¹⁰ Russ. & Ry. 237.

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*Le Mesurier v. Le Mesurier*¹¹ also supports the second proposition, and the later case of *Lord Advocate v. Jaffrey*¹² considered the difficulties which might arise as a result of any derogation from the law of domicile. Subsequently *Attorney-General for Alberta v. Cook*¹³ decided that a wife is not entitled to acquire a separate domicile from that of her husband even though she has obtained a decree of judicial separation. The judgment analyses¹⁴ those cases which appear to have been decided on a question of "hardship" to the wife and the conclusion is set out in substance on the last page.¹⁵ The decision was unpopular and gave rise to the Canadian Divorce Jurisdiction Act, 1930.

The two above-mentioned principles obviously give rise to difficulties, and the problem has been dealt with in different countries in various ways, one of which is by allowing a wife, who is abandoned by her husband, to acquire a separate domicile. A courageous attempt at this mode of relief was made in this country in the so-called "hardship" cases: *De Reneville v. De Reneville*,¹⁶ *Bater v. Bater*,¹⁷ *Stathatos v. Stathatos*¹⁸ and *De Montaigne v. De Montaigne*.¹⁹ But it is now clear that the principle of the separate domicile is not, on any showing, acceptable in English law or possible on any interpretation of *Travers v. Holley*.²⁰ The answer to the proposition that there must be some way out of the hardship caused to an abandoned wife by the principle of domicile is, it is submitted, that it must be by such means as may be enacted by statute and not by a too liberal interpretation of the law. [Indian, Commonwealth and English statutes entitling a wife to obtain a decree of divorce in the courts of a country other than that of the domicile were referred to.] These statutes in fact assert the principles which have been argued for; had the common law been other than as propounded, the statutes would not have been necessary. That being so, the crux of the problem raised by the present case is: In what circumstances will the English courts recognize a decree of divorce granted by a foreign court which does not base its jurisdiction on the husband's domicile? To answer this question the

¹¹ [1895] A.C. 517.

¹² [1921] A.C. 146; 36 T.L.R. 129.

¹³ [1926] A.C. 444; 42 T.L.R. 317.

¹⁴ [1926] A.C. 444, 453-456.

¹⁵ *Ibid.* 465.

¹⁶ [1948] P. 100; 64 T.L.R. 82;
 [1948] 1 All E.R. 56.

¹⁷ [1906] P. 209; 22 T.L.R. 408.

¹⁸ [1913] P. 46; 29 T.L.R. 54.

¹⁹ [1913] P. 154; 29 T.L.R. 654.

²⁰ [1953] P. 246.

position must be examined as it was before and after the decision in *Travers v. Holley*.²¹

One starts with the principle laid down in *Armitage v. Attorney-General*²² that English courts will recognize not only a decree of the courts of the husband's domicile but also a decree of any court recognized by them. The latter proposition was first laid down in that case and has never been departed from since. [*Clark v. Clark*,²³ 3 International Law Quarterly, p. 149, *Poingdestre v. Poingdestre*²⁴ and *Worth v. Worth*²⁵ were referred to.] Professor Graveson's article dealing with the capacity of a wife to acquire a separate domicile may be of persuasive value if, contrary to the present argument, this court holds itself able to consider such a question since *Travers v. Holley*.²⁶

[KARMINSKI J. I shall have to decide whether a wife is capable of acquiring a domicile of choice when she is still married but has never lived with the husband in the country where he is domiciled.]

There is no justification in English law for such a proposition; the wife nevertheless may be able to petition for divorce by virtue of the statutory relaxation of jurisdiction.

An important decision, before *Travers v. Holley*,²⁷ in which the recognition of a foreign decree obtained by a wife in courts other than those of the husband's domicile was considered, was the Scottish case of *Warden v. Warden (orse. Brotzen)*.²⁸ That case and a number of other cases which one would have thought would have been cited were not considered in *Travers v. Holley*.²⁹ In *Warden v. Warden (orse. Brotzen)*³⁰ a husband whose wife had obtained a decree in Nevada at a time when the husband was not domiciled there, prayed for a declaration, as in the present case, or a decree of divorce on the ground of adultery, the wife having remarried. He was granted the latter relief but refused the former, the Court of Session holding that the Scottish courts were not bound to concede to foreign courts the jurisdiction which by virtue of section 2 of the Law Reform (Miscellaneous Provisions) Act, 1949, they claimed for themselves, since that Act in contrast to the Matrimonial Causes (War Marriages) Act, 1944, made no provision for the recognition of the similar jurisdiction of other countries. The court also held that the period of six

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²¹ [1953] P. 246.

²² [1906] P. 135; 22 T.L.R. 306.

²³ (1921) 37 T.L.R. 815.

²⁴ (1909) 28 N.Z.L.R. 604.

²⁵ (1931) N.Z.L.R. 1109.

²⁶ [1953] P. 246.

²⁷ Ibid.

²⁸ 1951 S.C. 508.

²⁹ [1953] P. 246.

³⁰ 1951 S.C. 508.

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weeks' residence upon which the jurisdiction of the Nevada court was based was fundamentally different from the three years required by the Act of 1949. [5 International and Comparative Law Quarterly, p. 443, and 65 Harvard Law Review, p. 193, were referred to.] Dean Griswold's article in the latter journal is a most important contribution to academic literature on the recognition of foreign decrees.

With regard to the position after *Travers v. Holley*,³¹ it is submitted that both the judgments of Somervell L.J.,³² with which Jenkins L.J.³³ agreed on that point, and of Hodson L.J.³⁴ show that the test of reciprocity is the jurisdictional requirement and not the factual position; actual presence in the jurisdiction for three years will not suffice unless that is a requirement of the court claiming jurisdiction. [It was conceded by counsel for the husband that he would be unable to rely upon any similarity between the relevant parts of the Swiss Code and section 18 of the Act of 1950.] [Reference was made to 71 Law Quarterly Review, p. 562, and 17 Modern Law Review, p. 471.] The latter article points out that *Shaw v. Gould*³⁵ was not referred to in *Travers v. Holley*.³⁶ The subsequent decision in *Dunne v. Saban*³⁷ accepts the view that the court in *Travers v. Holley*³⁸ was referring to the jurisdictional requirement, which had to be substantially the same. In that case it was argued that the whole pronouncement of the court on the reciprocity point was obiter, since the husband was found to be domiciled within the jurisdiction of the court at the relevant time.

[KARMINSKI J. Is an alternative reason for the decision necessarily obiter?]

Two of the Lords Justices treated the recognition of the statute as the main point, and Jenkins L.J., who did not agree with them as to the question of domicile, concurred as to the point arising on the statutes. [32 Canadian Bar Review, p. 359, was referred to.] Further cases in which *Travers v. Holley*³⁹ was followed were *Carr v. Carr*,⁴⁰ in which the only difference was geographical—the Irish statute there under consideration was in similar terms to section 18 (1) (a) of the Act of 1950—and

³¹ [1953] P. 246.

³² Ibid. 251.

³³ Ibid. 254.

³⁴ Ibid. 256.

³⁵ L.R. 3 H.L. 55.

³⁶ [1953] P. 246.

³⁷ [1955] P. 178; [1954] 3 All E.R. 586.

³⁸ [1953] P. 246.

³⁹ Ibid.

⁴⁰ [1955] 1 W.L.R. 422; [1955] 2 All E.R. 61.

Arnold v. Arnold,⁴¹ in which Mr. Commissioner Latey Q.C. interpreted *Travers v. Holley*⁴² as referring to the factual realities. The passage as to the jurisdiction in the United States of America is, it is submitted, not good law.

The principles to be derived from *Travers v. Holley*⁴³ and the subsequent cases are: (i) The law as laid down in section 18 of the Matrimonial Causes Act, 1950, is the only exception to the rule that the husband's domicile is the governing jurisdiction in matrimonial matters. (ii) Since this statutory exception is an invasion of the general principle, it would be undesirable for the English courts not to recognize foreign decrees based upon a parallel jurisdiction. (iii) For that purpose the foreign statutory provision must, within narrow limits, correspond with the English statutory requirements. The words of the Court of Appeal leave no room for the suggestion that actual residence of three years or over will justify recognition here when the statutory requirements as to jurisdiction differ. (iv) This view, apart from being the unanimous view of the Court of Appeal, is obviously common sense, for otherwise, as remarked by Davies J. in *Dunne v. Saban*,⁴⁴ it would be impossible to know where to draw the line.⁴⁵

There is no other exception to the domicile rule than the statutory one, as extended to recognition by *Travers v. Holley*,⁴⁶ and the husband in this case cannot bring himself within that unless he can point to substantial similarity between section 18 of the Act of 1950 and the Swiss Code.

J. D. F. Moylan for the husband. The two propositions propounded for the Queen's Proctor are themselves based on the following three fundamental principles: (i) It is essential that the courts of this country should be able with certainty to ascertain the personal law of an individual, since that is the law which, inter alia, governs questions relating to status. It is desirable that there should be one single law governing all aspects of status, and English law has selected the law of the person's domicile as being the most convenient law: *Bell v. Kennedy*⁴⁷; *Udny v. Udny*.⁴⁸ (ii) It is in the interest of public policy to avoid, as far as possible, the scandals and difficulties arising from an individual having a certain status in one country and a different

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⁴¹ [1957] P. 237; [1957] 1 All E.R. 570.

⁴² [1953] P. 246.

⁴³ Ibid.

⁴⁴ [1955] P. 178.

⁴⁵ Ibid. 189.

⁴⁶ [1953] P. 246.

⁴⁷ (1868) L.R. 1 Sc. & Div. 307.

⁴⁸ (1869) L.R. 1 Sc. & Div. 441.

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status in another. (iii) The principle of comity. Owing to the development of the law these principles are now in conflict.

The development of the rules as to jurisdiction in matrimonial matters has depended, to a certain extent, on the question of convenience at various periods. Before 1857 the jurisdiction of the ecclesiastical courts was, for obvious reasons, based on residence. Subsequently, when there was only one competent court in England, and when, with the increased frequency of foreign travel, clashes of jurisdiction with foreign countries arose, domicile was adopted as the appropriate and most convenient test of jurisdiction, since it was believed that the courts of all civilized countries (or at least those whose law derived wholly or partly from Roman law) selected the law of the domicile as governing questions of status. This belief no longer accords with the facts. Now that, in the present situation of a shrinking world, many countries have accepted jurisdiction based on residence of varying degrees of permanence, it might well be more convenient and more consistent with those fundamental principles to revert to the old ecclesiastical rule of jurisdiction based on residence. It is interesting that the courts of the United States of America, starting with the English conception of the law of domicile, have, in fact, developed their law towards a jurisdiction based on residence, partly by judicial decision that a wife is capable of acquiring a domicile separate from that of her husband, and partly as a result of the "full faith and credit" clause of the Constitution by which the courts of one State are obliged to recognize the judgments and decrees of any other State arrived at in accordance with the law of that State.

It is submitted that English law has tended to become more liberal as to recognition of foreign judgments and decrees but more strict in its refusal to admit that a married woman can acquire a separate domicile during coverture. The high-water mark in the latter respect may be taken as *Attorney-General for Alberta v. Cook*,⁴⁹ which perpetuated the principle that husband and wife are one person in law. The only branch of law in which that principle still survives unscathed today is that of revenue law. Professor Graveson in 3 *International Law Quarterly*, p. 149, has suggested that the question of what law governs an individual's capacity to change his or her domicile is still entirely open in English law, and that it ought to be answered by holding that such capacity should be governed by the law of the domicile

⁴⁹ [1926] A.C. 444.

immediately preceding the purported change. Just as the previously established rule that foreign decrees are only recognized if granted by the courts of the domicile has been entrenched upon as a result of the statutory exceptions to the rule of English internal law that the courts have jurisdiction only if the parties are domiciled in England, similarly it is submitted that there is no reason in principle why the English courts should not recognize the acquisition by a wife under some foreign law of a domicile different from her husband's if English internal law itself were to introduce some exception to the rule that a wife cannot do so. This is, however, not material to the present case, since both by English and Swiss law the wife acquired her husband's English domicile upon marriage, and the law of England clearly provides that she was incapable of changing the domicile so acquired.

The decision in *Travers v. Holley*⁵⁰ that the New South Wales decree was to be recognized even if the husband had not been domiciled in that State at the commencement of the proceedings was clearly not obiter. It was the sole ground of the decision and even were it one of two grounds it would still not be obiter: see *Jacobs v. London County Council*.⁵¹ *Travers v. Holley*⁵² is not a decision to the effect that unless the provisions under which the foreign court exercised its jurisdiction are similar to those of section 18 of the Act of 1950 the English courts will not recognize a foreign decree where the facts are such that the English courts would have exercised jurisdiction under that section. The only principle which does emerge from that case is that the English courts, inasmuch as they themselves, by way of exception to the domiciliary rule, exercise an assumed jurisdiction, will recognize a foreign decree granted in circumstances similar to those which give rise to the exceptional jurisdiction of the English courts. There are phrases in the judgments which support both this petitioner's and the Queen's Proctor's contentions here. The issue in this case, namely, the degree of similarity of circumstances necessary as a prerequisite of recognition, was not present to the minds of the Lords Justices in *Travers v. Holley*.⁵³

It is submitted that in *Dunne v. Saban*⁵⁴ the judge wrongly held the statement of the law as to recognition in *Travers v. Holley*⁵⁵ to be obiter. According to the facts accepted by the Florida court, the husband had deserted the wife while the

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⁵⁰ [1953] P. 246.⁵³ Ibid.⁵¹ [1950] A.C. 361, 369; 66 T.L.R.⁵⁴ [1955] P. 178.

659; [1950] 1 All E.R. 737.

⁵⁵ [1953] P. 246.⁵² [1953] P. 246.

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parties were still domiciled in Florida; it is submitted, therefore, that the case was one where, in exactly similar circumstances, the English courts would have assumed jurisdiction under section 18 (1) (a), but this point does not appear to have been seriously argued by counsel or considered by the court.

Dean Griswold's article suggests that the proper rule is that the court of the forum should recognize a foreign decree where the facts existing when the foreign proceedings were commenced were such as would warrant the court in assuming jurisdiction in accordance with its own rules. The law does and can develop through the process of limitation of precedent to facts indistinguishable from those upon which the precedent authority was decided.

[KARMINSKI J. This particular set of circumstances has not been considered and is, therefore, at large.]

That is so, subject to general principles. Counsel for the Queen's Proctor said that the rule to be extracted from *Travers v. Holley*⁵⁵ is that foreign decrees should be recognized only if the jurisdictional requirements of the foreign law are substantially the same as those of English law. The alternative condition, which it is submitted is the correct one, is—if the facts are such that the English courts would assume jurisdiction under section 18. In considering which of these alternatives is correct, the law as applied to the domiciliary rule is prayed in aid. In considering whether a foreign decree should be recognized under that rule, the only question was: Were the parties domiciled in the country whose courts granted the decree according to the English meaning of domicile? The English courts never inquired on what basis the foreign court had assumed jurisdiction. It is therefore difficult to understand why, in deciding whether to recognize an exceptional jurisdiction, the English courts should give attention to the provisions of the foreign law rather than the facts. The application of *Travers v. Holley*⁵⁶ contended for by the Queen's Proctor gives rise to serious difficulties. For example, when considering whether the jurisdictional requirements of the foreign law are substantially similar to the provisions of section 18 (1) (b), are two or two-and-a-half years' residence sufficient? and what is the position when the English court finds in a section 18 (1) (a) case that the word domicile in the foreign law has a completely different meaning from the English usage? If that application be right, then the English court will be involved in an investigation

⁵⁵ [1953] P. 246.

⁵⁶ *Ibid.*

as to the meaning of words used in foreign laws. But following the application contended for by the petitioner, the English courts would merely inquire into the facts using their own conception of ordinary residence. This has the great advantage of simplicity and ease of application and corresponds exactly to the method always adopted in applying the domiciliary test.

[KARMINSKI J. If the jurisdictional requirement is, alone, the test, the difficulties of recognition will become more acute outside the common law countries, for laws which have a consistorial basis and those which are based on codes are unlikely to have much if anything in common.]

In *Carr v. Carr*⁵⁷ Barnard J. expressed himself as prepared to recognize the Irish decree because the English courts would have granted a decree "in those circumstances"⁵⁸; that means the facts being the same.

[KARMINSKI J. It would seem that the judge did not need to consider the facts in that case; all he had to do was to follow *Travers v. Holley*.⁵⁹]

In *Arnold v. Arnold*⁶⁰ the commissioner was holding that the decree should be recognized in England whether the circumstances under which the Finnish decree was granted were to be regarded as substantially similar to the provisions of section 18 (1) (a) or 18 (1) (b)—as to the latter provision, because the wife had been bona fide resident within the jurisdiction of the Finnish court. That case may be construed as being in favour of the proposition contended for, though the commissioner's statement that the length of residence in the foreign country is immaterial is not relied upon. [*Levett v. Levett and Smith*,⁶¹ *In re Scullard*,⁶² *Russell v. Russell and Roebuck*,⁶³ *Stransky v. Stransky*⁶⁴ and *Cheshire*, Private International Law, were referred to.] In *re Dulles' Settlement Trusts*⁶⁵ and *Harris v. Taylor*⁶⁶ show that the English courts will recognize a judgment properly obtained under the exceptional jurisdiction of a foreign court. Professor Graveson, in *Conflict of Laws*, 3rd ed., p. 397, and 3 *International Law Quarterly*, p. 149, appears to be in favour of the English court having regard to the facts and not the jurisdictional requirements.

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⁵⁷ [1955] 1 W.L.R. 422.

⁵⁸ *Ibid.* 424.

⁵⁹ [1953] P. 246.

⁶⁰ [1957] P. 237.

⁶¹ [1957] P. 156; [1957] 1 All E.R. 720.

⁶² [1957] 1 Ch. 107; [1956] 3 All E.R. 898.

⁶³ [1957] P. 375; [1957] 1 All E.R. 929.

⁶⁴ [1954] P. 428; [1954] 2 All E.R. 536.

⁶⁵ [1951] Ch. 843; [1951] 2 T.L.R. 145; [1951] 2 All E.R. 69.

⁶⁶ [1915] 2 K.B. 580.

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In conclusion, it is submitted that the court in *Travers v. Holley*⁶⁷ used the factual as well as the jurisdictional test. If the jurisdictional test only had been used, the court would not have found it necessary to proceed beyond the point of ascertaining that the New South Wales court had exercised jurisdiction under the provisions of a statute identical with section 18 (1) (a). Nothing in that case or in previous or subsequent cases is contrary to the proposition that in considering whether it is proper to recognize a foreign judgment the English court should look to the facts and not the grounds upon which the foreign court found that it had jurisdiction.

Cur. adv. vult.

KARMINSKI J. referred to the facts and the expert evidence, and continued: It is now well settled in English law that during coverture a wife retains the domicile of her husband. Desertion by a husband, followed by the acquisition by him of a new domicile of choice, still leaves the deserted wife's domicile that of the husband (see *Lord Advocate v. Jaffrey*¹). Even a decree of judicial separation pronounced in favour of a wife does not entitle a wife to acquire a domicile of choice different from that of her husband (see *Attorney-General for Alberta v. Cook*²).

In English law the basis of the jurisdiction in suits for dissolution has long been domicile. For many years prior to 1937 it was (except for certain statutory exceptions relating to spouses domiciled in England but residing in India) the sole basis for jurisdiction. In 1895 the law was enunciated by the Judicial Committee of the Privy Council in *Le Mesurier v. Le Mesurier*³ in these terms⁴: "according to international law, the domicile "for the time being of the married pair affords the only true "test of jurisdiction to dissolve their marriage": *per* Lord Watson.

Domicile ceased to be the only true test in 1937, when section 13 of the Matrimonial Causes Act, 1937 (now section 18 (1) (a) of the Matrimonial Causes Act, 1950), enabled the jurisdiction to be exercised provided that the husband had been domiciled in England at the time of his desertion or deportation, and notwithstanding any subsequent change in his domicile. The basis of the court's jurisdiction was further broadened by the

⁶⁷ [1953] P. 246.

¹ [1921] A.C. 146; 36 T.L.R. 129.

² [1926] A.C. 444; 42 T.L.R. 317.

³ [1895] A.C. 517; 11 T.L.R. 481.

⁴ [1895] A.C. 517, 540.

Matrimonial Causes (War Marriages) Act, 1944, and finally by section 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1949 (now section 18 (1) (b) of the Matrimonial Causes Act, 1950), which introduced three years' residence in England by the wife immediately preceding the commencement of the proceedings as a basis for jurisdiction.

Until 1937 the English courts recognized foreign decrees of dissolution if pronounced by the courts of the domicile of the spouses, or where (as in *Armitage v. Attorney-General*⁵) the courts of the domicile recognized the validity of a decree pronounced by the courts other than that of the domicile. After 1937 the English courts could entertain suits where, at the commencement of the suit, the spouses were no longer domiciled in England. This raised the question of recognition by the English courts of decrees pronounced by courts other than the courts of the domicile, but under circumstances where the English courts had themselves the power to entertain jurisdiction.

Though this question was a good deal canvassed by writers, it does not appear to have been judicially considered before 1951. In *Warden v. Warden (orse. Brotzen)*⁶ the wife had obtained a decree of dissolution from the courts of Nevada, though at the time of the institution of her suit the husband was domiciled in Scotland. The wife defended the husband's suit on the ground that the Nevada decree should be recognized by the Scottish courts, since the Nevada courts were exercising a jurisdiction based on residence similar to that conferred on the Scottish courts by section 2 (1) of the Law Reform (Miscellaneous Provisions) Act, 1949. This plea was rejected by the Lord Ordinary (Lord Strachan) who held⁷ that the Act of 1949, which extended the jurisdiction of the Court of Session, made no provision for the recognition of foreign decrees of divorce except when jurisdiction was based on domicile. Lord Strachan further held⁸ that there was no real similarity between the provisions of the Act of 1949 and the grounds upon which the Nevada courts assumed jurisdiction. It does not appear that the wife was resident in Nevada for three years immediately preceding the commencement of the proceedings there, so that Lord Strachan was not considering a case where the factual circumstances, namely, three years' residence, would have permitted the Scottish courts to have assumed jurisdiction.

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⁵ [1906] P. 135; 22 T.L.R. 306.⁷ Ibid. 511.⁶ 1951 S.C. 508.⁸ Ibid.

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In England the general question was first considered in *Travers v. Holley*.⁹ In that case the Court of Appeal had to consider the validity of a decree of dissolution on the ground of desertion pronounced by the courts of New South Wales. The Court of Appeal held, by a majority, that the husband had acquired, at the material date, a domicile of choice in New South Wales, and that the courts of that State had therefore jurisdiction on that ground to entertain the wife's suit. But the court also held unanimously that, as both the courts of New South Wales and of England claimed the same jurisdiction under section 13 of the Matrimonial Causes Act, 1937, and by section 16 (a) of the New South Wales Matrimonial Causes Act, No. 14, 1899, respectively, it would be wrong for the English courts to refuse to recognize a jurisdiction which *mutatis mutandis* they claimed for themselves. It is clear that the Court of Appeal decided this case on two grounds, and that, therefore, their decision on the second point cannot be treated as *obiter dicta* but as a material part of their decision (see *Jacobs v. London County Council, per Lord Simonds*¹⁰: " . . . there is, in my opinion, no " justification for regarding as *obiter dictum* a reason given by a " judge for his decision, because he has given another reason " also ").

In *Travers v. Holley*¹¹ the relevant provisions of the two Matrimonial Causes Acts differed only in wording: in other respects their provisions were identical. Somervell L.J. said¹²: " On principle it seems to me plain that our courts in this matter " should recognize a jurisdiction which they themselves claim. " I did not myself really understand on what grounds it was " submitted that the result would be otherwise."

Hodson L.J. said¹³: " . . . where, as here, there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse " to recognize a jurisdiction which *mutatis mutandis* they claim " for themselves. The principle laid down and followed since the " *Le Mesurier* case¹⁴ must, I think, be interpreted in the light " of the legislation which has extended the power of the courts " of this country in the case of persons not domiciled here."

It is clear that, in the present case, there can be no question of the Zurich courts exercising a jurisdiction *mutatis mutandis*

⁹ [1953] P. 246; [1953] 2 All E.R. 794.

¹¹ [1953] P. 246.

¹² *Ibid.* 249.

¹⁰ [1950] A.C. 361, 369; 66 T.L.R. (Pt. 1) 659; [1950] 1 All E.R. 737.

¹³ *Ibid.* 257.

¹⁴ [1895] A.C. 517.

on the same basis as the English courts, since the jurisdiction of the Zurich court was based on a concept of domicile wholly unrecognized by English law.

The decision of the Court of Appeal in *Travers v. Holley*¹⁵ has been considered in three subsequent reported cases. In *Dunne v. Saban*¹⁶ the wife brought proceedings for dissolution in the Florida courts in 1953, having resided in that State for not more than two years before the proceedings were commenced. At that time the husband had reacquired an English domicile: he took no part in the Florida proceedings, and the wife in due course obtained from the Florida courts a decree of dissolution. Thereafter, the husband brought proceedings in this court for a declaration that his marriage had been validly dissolved by the Florida courts. Davies J. dismissed the husband's petition. After a careful examination¹⁷ of the judgments in *Travers v. Holley*,¹⁸ he concluded his own judgment in the following terms¹⁹: "But I think that this case falls to be decided on a narrower ground than upon general considerations of that kind. I think that Mr. Wrightson's argument for the Queen's Proctor was plainly right. It seems to me that the statutory exceptions to the law regarding domicile as being the test of the jurisdiction to dissolve a marriage are exceptions, and that the rule, apart from those exceptions, remains in full force. In my judgment the observations in *Travers v. Holley*²⁰ decide that this court will recognize the rights of foreign courts to encroach upon this principle of domicile only to the extent to which this court also does. Where, as here, you find a court purporting, no doubt completely properly according to the laws of Florida, to exercise jurisdiction upon 90 days' residence, even though that is coupled with something that we do not recognize, namely, a separate domicile of the wife in the United States, the only possible answer which this court can give is to say that the decree of that foreign court was in our law invalid."

It will be observed that Davies J. was dealing with a case where, as here, the foreign court had founded jurisdiction on a basis (there, 90 days' residence in Florida together with a separate domicile by the wife in that State) not recognized in English law. But in the case now before me the wife had been resident in Zurich for over three years, whereas in *Dunne v.*

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¹⁵ [1953] P. 246.¹⁶ [1955] P. 178; [1954] 3 All E.R. 586.¹⁷ [1955] P. 178, 185-189.

P. 1958.

¹⁸ [1953] P. 246.¹⁹ [1955] P. 189-190.²⁰ [1953] P. 246.

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*Saban*²¹ the wife had been resident in Florida for only two years. I agree with Davies J. that this court will recognize the right of foreign courts to encroach upon the principle of domicile only to the extent to which this court also does. The difficulty in this case is to measure the extent where two systems of law approach the whole question of jurisdiction in wholly different manners.

*Travers v. Holley*²² was next considered and applied in *Carr v. Carr*.²³ There the wife had obtained a decree in Northern Ireland on the grounds of the husband's desertion. Subsequently the husband brought proceedings in this court on the grounds of the wife's desertion: she cross-charged the husband with desertion, and further sought a declaration that her marriage had been validly dissolved by the Northern Irish courts. Barnard J. found as a fact²⁴ that at the time of the proceedings in Northern Ireland the husband was domiciled there. But he also considered the provisions of the Matrimonial Causes Act (Northern Ireland), 1939, section 26, which are similar to the Matrimonial Causes Act, 1950, section 18 (1) (a), and stated²⁵ that this country will respect a foreign decree based on provisions similar to our own by reason of the fact that we ourselves will grant a decree in those circumstances. I think that Barnard J. was limiting himself in that case to the position before him, namely, a substantial similarity in statutory provisions as to jurisdiction.

In *Arnold v. Arnold*²⁶ the court had to consider the validity of a decree of dissolution pronounced in favour of a wife by the courts of Finland. There the husband had acquired a domicile of choice in Finland, but left the wife in 1930 and thereafter reacquired his English domicile. The wife remained in Finland, and commenced proceedings in the courts of Finland in 1939. The Finnish courts found that the husband had deserted the wife in 1930 and pronounced a decree of divorce. Article 8 (b) of the Finnish Act of December, 1929, may be in some respects similar in its provisions to section 18 (1) (a) of the Matrimonial Causes Act, 1950, and I am inclined to think that, applying the reasoning of the Court of Appeal in *Travers v. Holley*,²⁷ the validity of the Finnish decree might have been recognized on the ground of statutory similarity. Mr. Commissioner Latey Q.C., however,

²¹ [1955] P. 178.²⁵ Ibid. 424.²² [1953] P. 246.²⁶ [1957] P. 237; [1957] 1 All²³ [1955] 1 W.L.R. 422; [1955] 2

E.R. 570.

All E.R. 61.

²⁷ [1953] P. 246.²⁴ [1955] 1 W.L.R. 422, 425.

went further, and seems to have based his decision, at least in part, on section 18 (1) (b) of the Matrimonial Causes Act, 1950, using these words²⁸: "The fact that only six weeks or sixty or 'ninety days' residence suffices in certain States in the United States of America to found jurisdiction seems to me to be beside the point if in fact, there had been, say, two years' residence or more, or even less, if the residence is genuine and bona fide and not merely for the purpose of getting a divorce in a convenient court. The necessity laid down by statute in England for three years' residence, in the case of a wife whose husband is domiciled abroad, is probably due to the notion that our courts could not be used for the convenience of birds-of-passage, and that the court had to satisfy itself that the petitioning wife had chosen her home in England, though by operation of law her domicile was that of her husband domiciled abroad, and living either abroad or in England."

Whatever may have been the motive of the legislature in insisting on three years' residence under section 18 (1) (b) of the Matrimonial Causes Act, 1950, I cannot agree with Mr. Commissioner Latey Q.C. that the period of residence demanded by the law of a foreign court to found jurisdiction is immaterial, since the narrower jurisdictional approach may be included in the wider factual approach. If similarity is the basis of recognition, there must be similarity in fact though not in terminology. There seems to me to be a profound difference between the two years' residence in Florida found in *Dunne v. Saban*,²⁹ and the residence of three years and upwards in Zurich in the present case.

I believe that the true question to be answered in this case is whether the courts of this country can recognize a foreign decree where, in fact, the wife was resident in the territory of the foreign court for three years immediately preceding the commencement of the proceedings there, even though the jurisdiction of the foreign court was based on different grounds. In my view this question has not yet been asked or answered by our courts, and I am, therefore, without the guidance of direct authority. Writing in December, 1951, an eminent American jurist, Dean Erwin Griswold, used these words³⁰: "If the heavy hand of the *Le Mesurier* case³¹ can be lifted—as to a point which was

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²⁸ [1957] P. 237, 253.²⁹ [1955] P. 178.³⁰ 65 Harvard Law Review, pp. 193, 231.³¹ [1895] A.C. 517.

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“ never decided in that case—the courts should have little difficulty in concluding that a common law state may properly recognize a foreign divorce granted under the factual circumstances where it would itself grant a divorce.” In 1953 the Court of Appeal in *Travers v. Holley*³² lifted the heavy hand of the *Le Mesurier* case,³³ or at least mitigated its weight.

In my view the correct answer to the question which I have asked myself is this: where, in fact, there has been three years’ residence by a wife in the territory of the foreign court assuming jurisdiction in a suit for dissolution, the English court should accept that as a ground for exercising jurisdiction, because it would itself accept jurisdiction on proof of similar residence in England. It is not essential for recognition by this court that the foreign court should assume jurisdiction on the grounds laid down by section 18 of the Matrimonial Causes Act, 1950. It is sufficient that facts exist which would enable the English courts to assume jurisdiction. I find that the Zurich court here had jurisdiction, and that the decree pronounced by that court in favour of the wife on July 3, 1953, was valid. Accordingly, I declare that the marriage between the husband and the wife was validly dissolved on July 3, 1953, by the decree and judgment of the District Court of Zurich.

Declaration accordingly.

Solicitors: *Cartwright, Cunningham; The Queen’s Proctor.*

E. J.

³² [1953] P. 246.

³³ [1895] A.C. 517.

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RIDING v. RIDING.

1957
Dec. 9.

[1953 D. No. 1138.]

Lord Denning,
Hodson and
Morris L.JJ.

Husband and Wife — Maintenance — High Court — Committal order — Indorsement — Suspension on terms — Further default by judgment debtor — Committal order to issue indorsed for amount of original debt only — Matrimonial Causes (Judgment Summons) Rules, 1952 (S.I. 1952, No. 2209/L.21), r. 6 (3).

A divorced husband defaulted on payments under a maintenance order for £1 a week made against him in a district registry, and

his former wife as judgment creditor obtained, under the Matrimonial Causes (Judgment Summons) Rules, 1952,¹ an order of commitment to prison for six weeks unless he sooner paid the arrears of maintenance and the costs of the summons, amounting in all to £62 6s.; but it was directed that the order should be suspended under rule 6 (3) of the Rules of 1952 if the debtor paid by regular instalments 5s. a week off the amount indorsed on the order of commitment in addition to the £1 a week under the maintenance order. The debtor again defaulted on the payments and when further arrears of £56 15s. 6d. had accrued, the judgment creditor applied to the court for the issue of the order of commitment, to be indorsed for the amount of the original debt and also the subsequent accumulated arrears of maintenance—a total of £119 1s. 6d.:—

Held, that if the judgment debtor was committed to prison, he could be released on payment of the sum indorsed on the order of commitment only, for on its true construction rule 6 (3) applied only to the period during which the order of commitment was suspended.

APPLICATION, ex parte, from Judge George Maddocks, sitting as a special commissioner in divorce at Bolton County Court.

On January 14, 1955, Margaret Mary Riding, who had in 1954 obtained a decree for the dissolution of her marriage with Frank Riding, obtained an order against him in the Manchester District Registry for maintenance of the child of the marriage payable by instalments of £1 weekly. Default was made on these payments and the wife as judgment creditor took out a summons under rule 8 of the Matrimonial Causes (Judgment Summons) Rules, 1952, for the payment of £56 arrears then due. At the hearing of the summons before the special commissioner on April 24, 1956, at Preston, it was proved to the satisfaction of the court that the judgment debtor had means to pay the sum and it was ordered that he be committed to prison for 42 days “unless he shall sooner pay the sums in payment of which he “has so made default”—namely, the £56—together with the

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¹ Matrimonial Causes (Judgment Summons) Rules, 1952, r. 6: “(2) If “an order of commitment is made, “the judge may direct execution of “the order to be suspended on terms “that the debtor pays the amount “due, together with the costs of the “judgment summons, either at a “specified time or by instalments, in “addition to any sums from time to “time accruing due under the judgment. (3) If an order of commit-

“ment is suspended on such terms as “are mentioned in the last foregoing “paragraph, all payments thereafter “made under the order shall be “deemed to be made, first, in or “towards the discharge of any sums “from time to time accruing due “under the judgment, and secondly, “in or towards the discharge of the “debt in respect of which the judgment summons was issued and the “costs of the summons.”

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prescribed costs of £6 6s., a total of £62 6s.; but it was further directed that the order should lie in the Preston District Registry and not issue if the debtor paid, in addition to any sums from time to time accruing due under the order of January 14, 1955, the sum of 2s. 6d. each week, the first payment to be on April 30, 1956, until the arrears of £56 were fully paid, and in addition a further sum of 2s. 6d. each week, the first payment to be on August 1, 1956, in respect of the costs until they were fully paid.

Between the date of that judgment and October 9, 1957, the judgment debtor paid only £29 4s. 6d., and the judgment creditor accordingly applied for leave to issue an order of commitment of the judgment debtor, asking that the order should specify that he should be discharged only on payment of the £62 6s. due under the judgment summons of April 24, 1956, plus the unpaid arrears of current maintenance, which amounted to £56 15s. 6d., a total of £119 1s. 6d. That sum was claimed on the ground that the judgment debtor was precluded by the operation of rule 6 (3) of the Rules of 1952¹ from making payment of the amounts due under the judgment summons until he had satisfied in full the arrears of current maintenance.

The District Registrar rejected the figure of £119 1s. 6d., holding that the committal order should lie only in respect of the amount claimed and still outstanding under the judgment summons itself, namely, £62 6s., since the unpaid arrears of current maintenance were not the subject-matter of the judgment summons on which the committal was founded and in respect of which a warrant had been issued; and he refused to indorse the order of commitment for the amount prayed for. The judgment creditor appealed to the special commissioner in chambers against that decision. The commissioner adjourned his judgment into open court, and held that rule 6 (3) was for transient operation only, during the period of the suspension of the order of commitment, and that the warrant to be issued should be limited to the two sums—£56 and £6 6s. costs—for the default on which the judgment summons had originally been issued. He gave leave to appeal from that decision.

The judgment creditor appealed *ex parte*.

John Corcoran for the judgment creditor. The order for committal should not be discharged until the debtor has paid the full

¹ For footnote 1 see p. 89.

amount of £119 1s. 6d., that is, the amount of the judgment debt, and also the whole of the arrears of current maintenance accruing since that judgment. That is the effect of rule 6 (3), which provides that current maintenance must be paid up to date before any part of the payments by the debtor go to discharge the amount of the judgment debt. If that is not so, the anomalous situation would arise that the day before a wife sought leave to issue an order for committal the debtor could clear himself only by paying the instalments ordered on the judgment debt to date together with the current maintenance, or alternatively by paying the lump sum of £119; whereas on the following day, when the order of committal was made, he could get his discharge by merely paying the amount of the judgment debt.

[HODSON L.J. But the order before the court was for the payment of £62 6s. It would not be right to take into account anything that has happened since.]

That would be the position in other courts where there is a liquidated sum and costs on a judgment debt; but because maintenance is an amount accruing from time to time, the rule has been made to deal with the peculiar position in the Divorce Division. If rule 6 (3) contained any indication that it applied only to the period during which the order of commitment was suspended, the present indorsement for the payment of £62 6s. would be right. But the rule states quite clearly that if an order is suspended "all payments thereafter made . . . shall be deemed "to be made, first, in or towards the discharge of any sums from "time to time accruing due under the judgment, and secondly, "in or towards the discharge of the debt . . ." The words "during the suspension of the order" are not in the rule and ought not to be read into it by the court. There are no words limiting its duration, and since the legislature has seen fit by these rules to divorce the Divorce Division from the rules applicable in the High Court and the county court, the distinction ought to be applied in these circumstances. Moreover, it was within the discretion of the judge to make payment of the accruing and continuing maintenance a condition of the debtor's discharge.

LORD DENNING stated the facts set out above, and continued: The committal order was directed to issue, but the question is: how was it to be indorsed? On what terms could the husband get out of prison when he was put there?

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It is said, and has been argued before us today, that once he was in prison, he could not get out before the end of six weeks unless he paid £119 1s. 6d., that is, the original £62 6s. plus the £56 15s. 6d. that had become due since. Counsel for the applicant argued that the order ought to have been indorsed accordingly, whereas the registrar and the judge said that he should be released from prison at once if he paid the original debt of £62 6s.

The legal position depends on the true construction of rule 6 (3), which says: "If an order of commitment is suspended on such terms as are mentioned in the last foregoing paragraph, all payments thereafter made under the order shall be deemed to be made, first, in or towards the discharge of any sums from time to time accruing due under the judgment and secondly, in or towards the discharge of the debt in respect of which the judgment summons was issued and the costs of the summons."

It seems to me that that rule deals with payments which are made while the order of commitment is suspended. So long as it is suspended, all payments made by the debtor go first in discharge of the current maintenance, before they go against the original debt at all. But that is applicable only so long as the order of commitment is suspended. When it ceases to be suspended and he is actually committed to prison, then it is quite plain that he is committed to prison because of the original default in respect of the sum of £62 6s. That being the sum for which he was committed to prison, it is the sum which he has to pay in order to be released from prison before the end of the six weeks. I would dismiss the appeal accordingly.

HODSON L.J. I agree.

MORRIS L.J. I agree.

Appeal dismissed.

Solicitors: *Anthony Uwins, Law Society Divorce Department, Manchester.*

M. M. H.

CORKE v. CORKE AND COOK.

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Oct. 15;

Dec. 14.

Husband and Wife—Divorce—Evidence—Adultery—Evidence by wife and doctor of telephone conversation tending to prove innocence—Whether admissible.

Hodson,
Morris and
Sellers L.JJ.

Evidence—Subsequent conduct—Adultery—Evidence of telephone conversation with doctor tending to establish innocence—Whether admissible.

A wife who had left her husband because of his conduct, and in order to support herself and her children let rooms in her house to lodgers, was charged by her husband with committing adultery with the co-respondent, a male lodger. She immediately, though it was then after midnight, telephoned her doctor requesting him to come at once and examine both her and the co-respondent with a view to establishing their innocence of misconduct. The doctor did not examine them, being of opinion that any negative evidence which he might obtain would be valueless. At the hearing of the husband's petition the trial judge admitted the evidence of the wife, the co-respondent and the doctor as to the telephone conversation, and dismissed the petition. The husband appealed, contending that the judge had misdirected himself in law in admitting evidence of the contents of the telephone conversation:—

Held (per Hodson and Sellers L.JJ.) that it is a general rule of evidence that while a statement may be used against a witness as an admission, evidence of statements made on other occasions by a witness cannot be admitted in confirmation of his or her testimony at the trial. The evidence of the telephone conversation should therefore not have been admitted by the trial judge.

Dicta of Swinfen Eady L.J. and Neville J. in *Jones v. South Eastern & Chatham Railway Co.* (1918) 87 L.J.K.B. 775, 777 and 778, and of Eyre C.J. in *Rex v. Hardy* (1794) 24 State Trials 199, 1093 applied.

Per Morris L.J. (dissenting). The essential test as to the admissibility of evidence is the test of relevance to an issue to be tried, and relevance is to be judged by applying a fair-minded common-sense approach. If conduct which suggests guilt may be proved so may conduct which suggests innocence. If the respondent and the co-respondent genuinely believed that an immediate examination by a doctor could or might establish their innocence then their willingness to submit to an independent examination ought not to be regarded as irrelevant.

Observations of Viscount Simon in *Harris v. Director of Public Prosecutions* [1952] A.C. at pp. 706 and 710; [1952] 1 T.L.R. 1075; [1952] 1 All E.R. 1044; and of Lord du Parc in *Noor Mohamed v. The King* [1949] A.C. 182 at p. 192; 65 T.L.R. 134; [1949] 1 All E.R. 365 applied.

Held, further (per totam curiam), that the husband had not by his evidence established adultery and his petition must be dismissed.

C. A. APPEAL from Mr. Commissioner Blanco White Q.C.

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The husband, Corke, petitioned for divorce, alleging that his wife had committed adultery with the cited co-respondent, Cook, who was a lodger in the lodging-house of Mrs. Corke. The wife and the co-respondent denied adultery and the former cross-petitioned on the ground of cruelty. The case for the husband was that he and an inquiry agent on the night of April 2/3, 1955, were watching Mrs. Corke's house, 3, Bay Pond Road, Eastbourne, and overheard conversation between the wife and the co-respondent, and also sounds of a bed creaking in the bedroom of the co-respondent, which led them to infer adultery and to charge the parties with misconduct. The wife and the co-respondent at once denied the charge, and some 10 minutes later the wife telephoned her doctor requesting him to come and examine both her and the co-respondent. It was then after midnight and the doctor did not comply with the request, being of the opinion that any negative evidence which he might obtain would be of no value.

At the hearing of the petition the commissioner admitted evidence of the contents of the telephone conversation and dismissed both the petition and the wife's cross-petition alleging cruelty.

The husband appealed, contending that the commissioner had misdirected himself in law in admitting evidence of the contents of the telephone conversation between the wife and the doctor as part of the examination-in-chief of the doctor, the wife and the co-respondent.

H. B. Grant for the husband. The question is whether the commissioner was right in admitting the evidence as to the telephone conversation of the respondent wife with the doctor. Even if it was admissible, which is not admitted, it is submitted that the commissioner misdirected himself as to the probative value of the words. Subject to the res gestae rule, a statement made by a respondent to a third person, of which the husband had no knowledge, and the truth of which he has never directly or indirectly admitted, is inadmissible. That rule is stronger in civil actions than it is in criminal actions: *Gillie v. Posho Ltd.*¹ and *Jones v. South Eastern & Chatham Railway Co.*² The conversation between the respondent and the doctor was not part of the *res gestae* and therefore could not be admitted as evidence.

¹ [1939] 2 All E.R. 196, 200, 201.

² (1918) 87 L.J.K.B. 775.

[Stephen's Law of Evidence, 12th ed., art. 7, p. 13, was referred to.]

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[MORRIS L.J. Is not the test whether the evidence has any probative value?]

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The possibility of fabrication in favour of the person making the statement is the basis of the principle. [*Lejzor Teper v. The Queen*³ and *Chan Kau v. The Queen*⁴ were also cited.]

D. E. Peck for the wife. The evidence was admissible as part of the *res gestae*, as being relevant to the state of mind of the respondent and her reaction immediately following the accusation of adultery. In *Jones v. South Eastern & Chatham Railway Co.*⁵ the statement was made two days after the accident and not, as here, immediately after the accusation. There the evidence was tendered to prove the truth of the statement. Here it was not tendered for that purpose. The chance of fabrication is not the test here.

The co-respondent did not appear and was not represented.

Cur. adv. vult.

December 14. Their Lordships read the following judgments.

HODSON L.J. This is an appeal by a husband petitioner from an order of Mr. Commissioner Blanco White, who on February 18, 1957, dismissed a petition for divorce based on adultery, finding that the petitioner had not sufficiently proved the contents of his petition.

The suit was defended and both the respondent and co-respondent gave evidence denying the adultery alleged, but the commissioner found himself unable to regard either of them as witnesses of truth. He carefully considered the evidence tending to show whether or not the case was proved against the wife and co-respondent, and dismissed the charges of cruelty made by the wife against the husband in her answer.

By his judgment the commissioner made it clear that the balance was tilted in his mind in favour of the defence by one piece of evidence, and said in terms that if that evidence were excluded further consideration would, in his view, be necessary before he could decide whether adultery had been proved or not. Having admitted the evidence he found in favour of the defence

³ [1952] A.C. 480.

⁵ 87 L.J.K.B. 775.

⁴ [1955] A.C. 206.

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and concluded by indicating that in his view, if he were wrong, there should be a new trial. This position was accepted by counsel for the respondent, who has resisted the appeal, the co-respondent not having been represented or taken any part in the appeal. If this concession was rightly made and there was a case for the respondent and co-respondent to answer, on the facts found, the court would have no alternative to ordering a new trial if the court were of opinion that the scales were weighted in favour of the defence by an inadmissible piece of evidence.

It is necessary first to consider what the case for the petitioner was on the facts found by the commissioner. The wife had left the husband, driven, not by his cruelty, but by his conduct in showing her that he wanted to be rid of her. Her evidence as to this was accepted. She was thereafter living at 3, Bay Pond Road, Eastbourne, on an income of £3 10s. a week, out of which she had to pay £1 a week rent and to support herself and her children. The petitioner lived in another part of Eastbourne. No suggestion was made against her as a mother to the children or as to her moral character. She was almost inevitably forced to take in lodgers. The petitioner knew of and did not object to male lodgers, of which the co-respondent was not the first. At the time of her alleged adultery, namely, April 2/3, 1955, she had two lodgers, a Mrs. Pelling in a small bedroom over the kitchen, and the co-respondent, Cook, in a larger back room normally occupied by one or more of the children. No evidence was given to show that the respondent and co-respondent were on terms other than that of landlady and lodger, nor was there any concealment from the husband of the position.

The petitioner on March 12 inquired by letter of the respondent what her intentions were with regard to the co-respondent. On receipt of the letter by the respondent the co-respondent visited the petitioner and they both saw the respondent, but nothing of significance occurred at this conversation and the petitioner expressed himself satisfied although his was only a pretended satisfaction. The petitioner then engaged an inquiry agent to watch the house, 3, Bay Pond Road. The effect of this evidence was that the co-respondent came to the house at 9 o'clock, there was conversation in the co-respondent's bedroom and creaking of the bed, lasting about 15 minutes, somewhere about midnight. There was no dispute that the bed was creaking and that the wife was sitting on the co-respondent's bed. What she was doing in the co-respondent's room was explained by the

wife and the co-respondent, but their evidence was not accepted by the commissioner, who did not feel that their explanation was correct and expressly disbelieved the wife when she said that that was the first time she had been in the co-respondent's bedroom. Even if this answer is disbelieved~~X~~ the fact remains that there was no evidence that the respondent had ever been in the lodger's bedroom when he was there on any other occasion, and the rejection of her denial is no substitute for such evidence. The wife heard a noise, as she said, as she left the co-respondent's bedroom, went downstairs and confronted the petitioner and the inquiry agent, who accused her of adultery, which she denied. The co-respondent came down also and so far from making any admission of adultery, abused the petitioner roundly.

The commissioner, in a careful judgment, recognized that the respondent was of good reputation, and that there was a considerable disparity of age between the parties—the co-respondent being 56 and the respondent 34 years of age—and that there was nothing in the evidence to show that the relationship between them was other than an extremely friendly one between lodger and landlady. He also noticed that the petitioner and the inquiry agent spoke of conversation during the 15 minutes on the night in question, which struck him as remarkable if they were purporting to prove that adultery was then taking place. He also noticed that Mrs. Pelling, although handicapped as a witness by deafness, said that she never saw any improper conduct or familiarity between her landlady and the other lodger.

Upon these facts, standing alone, unsupported by the further matter which influenced the commissioner's mind, it appears to me that the petition should fail and that this court is in a position to support the commissioner's judgment. Opportunity for adultery no doubt there was, but evidence of inclination to commit adultery there is none, unless it can be inferred from the circumstances that the landlady was talking to the co-respondent, who was in his bed in his own bedroom, for 15 minutes on the night in question. I cannot draw that inference from those circumstances, nor do I feel it possible to do so when the additional circumstance is added that the respondent was disbelieved when she said that this was the first time that she had been in the co-respondent's room, and that the co-respondent was found to be a witness unworthy of credit, having given an answer which the commissioner found to be untrue with regard to his own marital situation.

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Since, however, the commissioner rested his final decision on a piece of evidence which, in his view, settled the question in favour of the defence, and this has been the only ground of appeal argued in this court, I ought to express my view upon it, especially as, if he was right in the conclusion that the matter was otherwise so evenly balanced that this piece of evidence tilted the scale in favour of the defence, there would be the necessity for a new trial if the evidence were wrongly admitted.

The ground of appeal is that the judge misdirected himself in law in admitting evidence of the contents of a telephone conversation between the respondent and a Dr. Churcher in the early morning of April 3, 1955, as part of the examination-in-chief of Dr. Churcher and of the respondent and co-respondent.

The evidence admitted was to the effect that after the departure of the petitioner and the inquiry agent the respondent, at the instigation of the co-respondent, rang up her doctor, Dr. Churcher, and asked him to come down at once—at about 12.30 in the morning of April 3—and examine her and a gentleman to prove that they had not been guilty of adultery with one another. The doctor did not come because he said he could prove nothing of the kind, and when he gave evidence he confirmed that he had been asked to examine the respondent and a person staying in the house but made it plain that any negative evidence he would have given would have been, in his opinion, valueless.

The commissioner relied upon article 7 of Stephen's Digest of the Law of Evidence, 12th ed., p. 13, which reads as follows: "When there is a question whether any act was done by any person, the following facts are deemed to be relevant, that is to say—any fact which supplies a motive for such an act, or which constitutes preparation for it; any subsequent conduct of such person apparently influenced by the doing of the act, and any act done in consequence of it by or by the authority of that person." He said that the conduct of the wife in ringing up the doctor seemed to be clearly admissible on the general principle indicated in that article, and the words she spoke to the doctor also appeared to him to be admissible as explaining what she was doing in ringing up the doctor. He concluded by saying that this subsequent conduct throws great light upon the fact whether or not she had committed adultery.

The question is really whether her words spoken to the doctor can be received, because her conduct in thus ringing up the doctor is of no significance without the words spoken, either given in evidence or inferred from the fact that she spoke to him at all

at that time. At first impression there is much to be said for the view formed by the commissioner; but on consideration I have come to the conclusion that this view is incorrect and not supported by authority, which, indeed, is all the other way. It is first to be noticed that the article in Stephen's Digest is dealing with matters which are evidence against any person, not in their favour. This appears from the illustrations which follow the Article itself, the last of which, taken from a civil case, I will read:

"(e) The question is, whether A suffered damage in a " railway accident.

" The fact that A conspired with B, C and D to suborn false " witnesses in support of his case is deemed to be relevant, as " conduct subsequent to a fact in issue tending to show that it " had not happened."

This illustration was taken from *Moriarty v. London, Chatham & Dover Railway Co.*,¹ where it was held that evidence was rightly received as amounting to evidence of an admission, by conduct, of the plaintiff that he had a bad case. The rule in this article deals with admissions and it does not follow that conduct of a party evidenced by statements in his or her own favour can be proved to support his or her case.

A good illustration of the rule as to the rejection of statements not amounting to admissions is contained in *Jones v. South Eastern & Chatham Railway Co.*² A woman's hand was injured by blood poisoning. She alleged that the injury was caused by pinching her thumb on a nail while working on her employers' premises. They alleged that the injury was received at her home. Evidence was heard of statements made by her to certain persons that she had done it at home and evidence to the contrary effect of statements made by her, inter alia, to a doctor was rejected as inadmissible. It was argued on her behalf that such evidence should be received to substantiate the consistency of her story as to the accident and to show that it was not subsequently fabricated, especially as evidence of statements adverse to her interest had been admitted. This argument was not accepted. It was held by the Court of Appeal that the statements in the appellant's favour were rightly rejected as inadmissible. Swinfen Eady L.J. said³: "It was argued that " there is in certain cases a rule under which a witness may be " asked to give particulars of what a person has said shortly after

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¹ (1870) L.R. 5 Q.B. 314.

³ Ibid. 777.

² (1918) 87 L.J.K.B. 775.

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“ an occurrence, and the complaint that such a person may have
 “ made shortly after an occurrence, not as being evidence of the
 “ facts complained of but as being evidence of the consistency of
 “ the story of the complainant from beginning to end, and it is
 “ said that such a question ought to have been admitted in the
 “ present case on that principle. The answer is twofold; first,
 “ that the principle has no application to a case of this kind.
 “ No doubt in cases especially of violence upon women and girls
 “ the rule is established under which a question of that kind is
 “ allowed to be put, and a recent statement is allowed to be
 “ given in evidence—see *Regina v. Lillyman* ⁴—that is to say,
 “ that upon the trial of an indictment for offences against women
 “ and girls involving violence, the fact that complaint is made
 “ by the prosecutrix shortly after the occurrence, with the par-
 “ ticulars of the complaint made, so far as they relate to the
 “ charge against the prisoner, are allowed to be given in evidence
 “ on the part of the prosecution, not as being evidence of the
 “ facts complained of, but as evidence of the consistency of the
 “ conduct of the prosecutrix with the story told by her in the
 “ box, and as tending to negative any consent of hers. That is
 “ a special class of case in which such evidence has for a very
 “ long time been allowed to be admitted, but it has nothing to
 “ do with such a case as the present.”

Bankes L.J. was of the same opinion, and Neville J. gave judgment as follows ⁵: “ I have come to the same conclusion.
 “ The short point is whether the learned county court judge
 “ rejected the evidence improperly under these circumstances.
 “ The applicant, who had injured her thumb, alleged that the
 “ injury was occasioned upon her employers’ premises, and gave
 “ evidence to that effect. She was cross-examined to show that
 “ she had made statements after the happening of the accident
 “ inconsistent with her story there, and the point was made, as
 “ I understand it, that that being so, it is permissible to call
 “ evidence to show that she had made statements to persons
 “ consistent with the story which she told in the box so as to
 “ negative any idea suggested by the cross-examination of her
 “ story being a made-up affair. I think that the cases which
 “ have been cited are in no sense in *pari materia*, and I think
 “ that we have simply to apply here the general rule of evidence
 “ that statements may be used against a witness as admissions
 “ but that you are not entitled to give evidence of statements

⁴ [1896] 2 Q.B. 167; 12 T.L.R.⁵ 87 L.J.K.B. 775, 778.

"on other occasions by the witness in confirmation of her testimony. I think, therefore, that no question of any difficulty arose before the county court judge, and that he was perfectly right in ruling as he did."

In the opinion of the Privy Council these observations of Neville J. correctly set out the rule: see *Gillie v. Posho Ltd.*⁶ The rule is of long standing and is always strictly applied in criminal cases. See the language of Eyre C.J. in *Rex v. Hardy*⁷: "Nothing is so clear as that all declarations which apply to facts and even to the particular case that is charged, though the intent should make a part of that charge, are evidence against a prisoner and are not evidence for him, because the presumption . . . is, that no man would declare anything against himself, unless it were true; but that every man, if he was in a difficulty, or in the view to any difficulty, would make declarations for himself."

Different considerations may well apply where the state of a person's mind is in issue (for example, domicile cases), but those considerations do not, in my judgment, apply to this case which involves the straight issue of adultery. This offence could be proved by admissions tending to show that it had been committed but cannot be disproved by statements of the person charged afterwards made to third persons tending to show that it had not been committed.

It appears from the authorities that the rule is justified by the risk of fabrication by a person who, in the words of Eyre C.J., might be in a difficulty. Take this case. The respondent seeks to support her defence by showing that she was ready to submit to a scientific investigation to show that the charge made against her must be untrue. If she had submitted to an examination evidence as to her condition would, of course, be relevant and admissible, but the statement that she made to the doctor that she was willing to be examined to this end, is of no value. Persons who are unjustly charged will often react in different ways. Some may protest their innocence to all and sundry, others may be so stunned by the allegation that they refrain from so doing or from taking any prompt steps to assert their freedom from guilt. There is no reason, in my opinion, why justice requires the admissibility of such evidence in favour of an accused person for it seems the fundamental basis of the rule is that such evidence has no probative value.

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⁶ [1939] 2 All E.R. 196.

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⁷ (1794) 24 State Tr. 199, 1093.

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Since, on the view which I have formed upon the facts found by the commissioner, who heard and carefully considered the evidence, the conclusion ought to be that adultery is not proved, quite apart from the admissibility of the evidence I have just discussed, the result should therefore be not that there should be a new trial but that the judgment of the commissioner should be affirmed and the appeal dismissed.

I should add that although counsel for the appellant confined his argument to the point whether or no the commissioner had rightly admitted the questioned evidence, he was offered, but did not avail himself of, the opportunity of arguing the case on the basis that in any event, upon the facts as found (apart from this evidence), the appeal should be allowed.

MORRIS L.J. The commissioner had before him a husband's petition for dissolution of marriage, based on the allegation of adultery between the wife and the co-respondent. The wife and the co-respondent denied adultery, and the wife alleged that her husband had treated her with cruelty and she cross-prayed for dissolution. The commissioner, in his judgment, said that having had an opportunity of watching the demeanour of the husband and wife in the witness-box he did not regard either of them as being particularly reliable as witnesses. He formed a similar opinion in regard to the co-respondent. Having considered the evidence, the commissioner rejected the charges of cruelty made by the wife and, not being satisfied that the wife and the co-respondent had at any time committed adultery, he rejected the husband's petition. There was a specific charge that adultery had been committed on the night of April 2/3, 1955. In rejecting it the commissioner was very considerably influenced by certain evidence which he accepted in regard to the conduct of the wife and the co-respondent on the night in question.

The husband alleged and sought to prove that on the night of April 2/3, 1955, the wife had intercourse with the co-respondent in a bedroom in a house in Eastbourne. The wife and the co-respondent were admittedly in the house. The husband and an inquiry agent kept observation at the back of the house. The co-respondent had a bedroom at the back. The husband and the inquiry agent heard a man and a woman conversing in that room: they also heard the noise of the creaking of a bed in that room: they heard that noise during a period of somewhere about a quarter of an hour, at about midnight. The court was invited to say that adultery was being committed by the wife with the

co-respondent. The wife and the co-respondent said that the conversation was in fact theirs and that it did take place in the co-respondent's bedroom at a time when the co-respondent was in his bed alone. They gave a full explanation of why it was and how it came about that the wife went into the room. They denied that there was any intercourse. The task of the court was to decide whether or not there had been intercourse. In discharging that task the court would have to consider and weigh up all the relevant evidence and decide what inferences could fairly be drawn. As Lord Buckmaster said in his speech in *Ross v. Ross*⁸: "Adultery is essentially an act which can rarely be proved by direct evidence. It is a matter of inference and circumstance. It is easy to suggest conditions which can leave no doubt that adultery has been committed, but the mere fact that people are thrown together in an environment which lends itself to the commission of the offence is not enough unless it can be shown by documents, for example, letters and diaries or antecedent conduct, that the association of the parties was so intimate and their mutual passion so clear that adultery might reasonably be assumed as the result of an opportunity for its occurrence."

In the same case Lord Atkin in his speech said⁹: "But from opportunities alone no inference of misconduct can fairly be drawn unless the conduct of the parties prior, contemporaneous, or subsequent justifies the inference that such feelings existed between the parties that opportunities if given would be used for misconduct."

After the husband and the inquiry agent had observed and listened, they made their presence known, and in circumstances which need not be detailed they orally charged the wife and then the co-respondent with having had intercourse. The charge was denied. The husband and the inquiry agent then left. After an interval of a few minutes the wife and the co-respondent went to a nearby telephone call-box and the wife telephoned her doctor. The wife gave evidence that she asked her doctor if he would then come to her house in order to examine her and to examine the co-respondent and give his opinion as to whether or not there had been intercourse. The co-respondent gave evidence to the same effect. The doctor was also a witness and said that he was asked to go to prove that sexual intercourse had not occurred. The doctor formed the view that an examination of the wife was

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⁸ [1930] A.C. 1, 7.⁹ Ibid. 21.

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not worth undertaking for the purpose of substantiating that intercourse had not taken place. He accordingly declined to go to the house. In his evidence in court he said that if an examination revealed fresh semen in the vagina, there would then be evidence that intercourse had occurred, but that if examination revealed no traces of semen in the vagina or elsewhere, this would not amount to positive proof that intercourse had not occurred.

The notice of appeal against the dismissal of the husband's petition raises only one point; it is said that the commissioner "misdirected himself in law in admitting evidence of the contents of a telephone conversation between the respondent and one Dr. Churcher in the early morning of April 3, 1955, as part of the examination-in-chief of Dr. Churcher and of the respondent and co-respondent." In the notice of appeal the order which was sought was that the judgment dismissing the petition should be set aside and a decree pronounced; alternatively, a new trial was sought. On the hearing before us it was argued on behalf of the husband that there should be a new trial. Though counsel for the wife did not take the point (and counsel for the husband, being given the opportunity, did not wish to deal with the point), it would not seem, on the findings as recorded in the judgment, that the evidence against the wife and the co-respondent was sufficient to warrant a finding of adultery. The commissioner's view was that if the evidence to which objection was taken had been excluded, further consideration would have been necessary as to whether adultery was or was not sufficiently proved.

At the hearing it in fact happened that the doctor gave evidence before the wife and co-respondent. That came about merely as the result of assisting the convenience of a medical man. Actually the evidence objected to was given in response to a question put by the commissioner. The doctor had earlier said that he had been telephoned by the wife. What then was asked was as follows: "Mr. Peck: Will you please answer this question 'yes' or 'no.' Did Mrs. Corke make a request to you that was somewhat surprising? The commissioner: Wait a moment. That is not evidence. You can ask whether Mrs. Corke spoke to him. Dr. Churcher: Oh, yes. Mr. Peck: Did what she said to you surprise you in any way? The commissioner: That is not evidence, whether he was surprised. I take it it is relevant to cruelty? Mr. Peck: Relevant to adultery. The commissioner: Then I do not know that you are entitled to get anything. When you are dealing with cruelty you are entitled to ask if there is a complaint. Mr. Peck: Am I not

"entitled to ask whether what was said to him affected his mind
 "in any way? The commissioner: No. Nobody is charging
 "anyone with being cruel to the doctor. Mr. Peck: What I am
 "trying to get is the impression of what was said, not the words
 "said. The commissioner: No."

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In view of the basis advanced to justify the questions I think that the commissioner was clearly right in not allowing the matter to be pursued. Later, when the doctor was being cross-examined, the commissioner put this question: "Did she, when she rang you up on the telephone, by any chance ask you if she could be examined to see whether she had had recent sexual connexion? (A.): She asked me to come to examine her and someone who was staying in the house." There was objection taken and the commissioner ruled as follows: "I hold that it is admissible as conduct on her part, at any rate so far as it deals with recent matters, to show innocence of a matter of which she had been accused. What she says to the doctor is not evidence of anything that has happened but it is conduct on her part." When, later, the wife gave evidence and said that she went to the telephone box and telephoned Dr. Churcher the question was put to her: "For what purpose did you telephone Dr. Churcher?" The substantial question raised in the appeal is whether she was entitled to answer the question.

One of the issues at the hearing was whether she had sexual intercourse at a particular time. The question now raised is whether she could prove that immediately after the time of the alleged intercourse she was willing to be examined and took steps to have herself examined by a medical man. It is said, in a case in which all surrounding circumstances may be examined to see whether any inferences of guilt may be drawn, that the wife and the co-respondent in defending themselves are precluded from informing the court as to the above-mentioned feature of their conduct and attitude when accused.

The case is not one in which attempt is merely being made to give evidence of some statement made by a party by way of an affirmation of innocence or in support of the party's case. If the wife had telephoned to a friend and had said that she had been accused of committing adultery and had said that the accusation was false, it would clearly not be possible to allow her or the friend to give evidence of the conversation. The value of any such proffered evidence would be negligible even if some tenuous reason for its admissibility could be formulated: a court

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could not be assisted by being told that the wife, who at a hearing could give evidence on oath which would be subject to cross-examination, had in a conversation with a friend or even in dozens of conversations with dozens of friends, made unsworn protestations of innocence; the accumulated experience of the past, coupled with knowledge of the obvious possibilities of fabrication of any such evidence, would direct the rejection of the evidence as lacking in the qualities which assist proof and so as being valueless and irrelevant. (Compare *Jones v. South Eastern & Chatham Railway Co.*¹⁰)

In my judgment the essential test as to the admissibility of evidence is the test of relevance. In dealing with a criminal case Lord Simon, in his speech in *Harris v. Director of Public Prosecutions*,¹¹ said: "The substance of the matter appears to me to be "that the prosecution may adduce all proper evidence which tends "to prove the charge." But to that Lord Simon added that regard must be had to a rule of judicial practice which is followed by judges when trying a charge of crime. The rule was expressed by Lord du Parcq in *Noor Mohamed v. The King*¹² in these words: "... the judge ought to consider whether the evidence "which it is proposed to adduce is sufficiently substantial, having "regard to the purpose to which it is professedly directed, to "make it desirable in the interest of justice that it should be "admitted. If, so far as that purpose is concerned, it can in the "circumstances of the case have only trifling weight, the judge "will be right to exclude it. To say this is not to confuse weight "with admissibility. The distinction is plain, but cases must "occur in which it would be unjust to admit evidence of a "character gravely prejudicial to the accused even though there "may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the "sense of fairness of the judge." So later in his speech Lord Simon said¹³: "A criminal trial in this country is conducted for "the purpose of deciding whether the prosecution has proved that "the accused is guilty of the particular crime charged, and evidence of 'similar facts' should be excluded unless such evidence "has a really material bearing on the issues to be decided."

The principle is, therefore, that all proper evidence may be given which tends to prove a charge: but when trying a charge

¹⁰ 87 L.J.K.B. 775.

¹² [1949] A.C. 182, 192; 65 T.L.R.

¹¹ [1952] A.C. 694, 706; [1952] 1 134; [1949] 1 All E.R. 365.

T.L.R. 1075; [1952] 1 All E.R. 1044.

¹³ [1952] A.C. 694, 710.

of crime the essentials of justice are to be set above technical rule if a strict operation of the latter would operate unfairly against an accused.

In the present case the issue before the court was whether two people had had sexual intercourse at a particular time. Those who asserted that they had were entitled to put before the court all relevant evidence from which an inference of misconduct could fairly be drawn. Evidence could be given of the conduct of the parties "prior, contemporaneous or subsequent" if it justified an inference of strong mutual attachment. If the test of admissibility is the test of relevance to an issue to be tried, then, in my judgment, relevance is to be judged by applying a fair-minded common-sense approach. In the present case, just as all relevant evidence may be given to prove the charges asserted, so, in my judgment, all relevant evidence may be given to disprove them. If conduct which suggests guilt may be proved, so may conduct which suggests innocence.

There are innumerable circumstances in which evidence is given which seems to prove a consciousness of guilt, and which fair-minded persons deem relevant when considering whether guilt is proved. Thus it may be that in certain circumstances evidence would be admissible that an accused person had taken flight or concealed himself, or assumed a false name or indulged in falsehood as by giving a false name or address or explanation, or had fabricated evidence or suppressed it or had sought to suborn witnesses by bribery. Questions as to the admissibility of evidence have to be decided upon a consideration of the facts of the situation in a particular case. In so many cases evidence of a person's conduct may be very relevant in regard to the issue to be tried.

In the present case, if the wife and the co-respondent genuinely believed that an immediate examination by a doctor could or might establish whether they had recently had intercourse, then, in my judgment, their willingness to submit to the independent examination of a professional man ought not to be regarded as irrelevant. The co-respondent in his evidence said: "I had the impression—I had the thought that if the doctor " could examine both Mrs. Corke and myself, he would be able " to decide whether any sexual intercourse had taken place or " not. I did not know. It was in desperation. I wanted some- " one to come along and say that it did not happen. We have " said it, and everyone else says, ' Oh, but it did,' but it did not,

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 " the doctor phoned."

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In my judgment, evidence as to the conduct of the wife and co-respondent upon being accused of adultery cannot be ruled out as irrelevant. The weight of it was for the trial judge. I cannot but think that members of a jury—if a jury had been trying the case—would have regarded the evidence of the conduct of the wife and co-respondent as being evidence fit to be considered as being relevant to their inquiry. They would judge whether much or little weight should be given to it. The commissioner, with his experience, certainly found it helpful. In his judgment he said: "I regard the action of the respondent, "at the co-respondent's instance, in ringing up the doctor and "endeavouring to get the doctor to come down and examine both "her and the co-respondent, as a very strong point in her favour "and his favour, which makes it quite impossible for me to say "that I am satisfied beyond reasonable doubt that sexual "intercourse took place that night."

The wife and the co-respondent were open to cross-examination as to their conduct. If it had been shown that they had no belief that an examination of them by a doctor would be of any value, or no expectation that the doctor would come, then their attempt to get the doctor might have been exposed as insincere humbug and might have recoiled against them as conduct tending to suggest or to confirm a guilty intrigue. Any such possibilities were for consideration by and for the assessment of the trial judge. If the doctor had in fact gone to the house and examined the two people, he could have given evidence as to what was the result of his examination. But I consider that the wife could have given evidence as to how it came about that the doctor had visited. I see no reason why in that situation the court should be uninformed and merely left to guess as to why the visit was made. It may be said that the wife would not have requested a visit unless she had thought that her innocence might as a result be proved, and that in giving evidence that she asked for a visit she was inferentially protesting her innocence. But there is much more than an implied protestation: there is the willingness to submit to the examination of an independent professional man. If such willingness may fairly be regarded as an indication of innocence, then the best of reasons exists for bringing it to the consideration of a court whose solemn duties include both clearing the innocent and convicting the guilty.

Professor Wigmore, in his Treatise on the Law of Evidence (see vol. 1, p. 384), points out that a tendency to reject evidence of a consciousness of innocence is due to a distrust of the inference from conduct, since conduct is often feigned and artificial. While referring to the circumstance that a majority of the courts have refused to allow conduct to be considered for the purpose of drawing an inference of consciousness of innocence, he reasoned: "It is judicially conceded that the inference of consciousness of guilt is a highly dubious one, and that the evidence is never to be emphasized or treated as of much value. If this is so, why should we strain a doubt to admit a dubious inference against the accused and yet refuse to admit in his favour a scarcely more dubious one? Such an attitude is wholly inconsistent with itself and is out of harmony with the spirit of our law. Let the accused's whole conduct come in: and whether it tells for consciousness of guilt or for consciousness of innocence, let us take it for what it is worth, remembering that in either case it is open to varying explanations and is not to be emphasized. Let us not deprive an innocent person falsely accused of the inference which common sense draws from a consciousness of innocence and its natural manifestations."

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In my judgment, the test to be applied in deciding whether evidence was receivable of the telephone conversation was simply the test of relevancy. The substance of the matter was that the wife was asking the doctor to come to examine her and the man. It was not as though the wife was merely making some statement to someone else which she could equally well make at a later time in the witness-box. It was for the commissioner to consider whether the wife was indulging in some cunning play-acting. If he thought that she was not, and if he thought that she genuinely believed that she could establish her innocence, then the commissioner would give such weight to the question of her conduct and behaviour as seemed fitting. In my judgment, the commissioner was justified in admitting the evidence which he received, because he was entitled to consider the conduct of the parties as being within the range of all the many facts and circumstances which he could review and have in mind when deciding the issue which was before him.

I would dismiss the appeal.

SELLERS L.J. I agree with both of my Lords, and for the reasons they give, that the evidence adduced on behalf of the

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petitioner was insufficient to justify a finding of adultery by his wife, and that the appeal must be dismissed on that ground.

In these circumstances, it will not avail the husband to establish that evidence which the commissioner thought told in favour of the wife was wrongly admitted. I do not, therefore, examine in detail the authorities which might throw light on the question of the admissibility of the wife's request over the telephone to the doctor to come to examine both her and the co-respondent, and of the doctor's evidence of what the wife said on the telephone. The doctor did not go out and examine the wife or the co-respondent, and one cannot assume or conjecture what he would have found if he had. Dr. Churcher's view at the time of the request, and in his evidence, was that an examination for the purpose of "substantiating that sexual intercourse had not taken place was not worth doing." He added later: "If fresh semen is found in the vagina, that is evidence that the act has occurred, but to adduce evidence and say that it has not occurred is not evidence at all. The only evidence that is of value is positive evidence. Negative evidence has no value whatever."

If, therefore, he had conducted an examination of the wife in the early hours of the morning after the husband's unexpected call at the wife's house about midnight, the doctor would either have found some evidence of intercourse (in which case the wife would not have called him, one imagines, as a witness), or else would have found negative conditions of no value whatever.

The wife had had three children, and it is difficult to follow the commissioner's comparison with medical evidence in the criminal courts, which generally refers to positive findings indicating intercourse of male or female, or negative findings in relation to very young girls or virgins. The commissioner finds that the respondent could not have known that an examination would not have been of assistance to the court. This seems to me to be unsustainable. It might have served to deceive the court. Intercourse might well have taken place in a manner which would leave no trace of spermatozoa. In 1952 the wife had been very worried about her third pregnancy, which she had been most anxious to avoid. It was unlikely that she would willingly risk another in the circumstances in which she found herself. How bold a suspected wife could be to ring up her doctor—or indeed to go to her doctor—when she would know either that no trace of intercourse would be there, or any that had occurred had been removed, or even know, as she might, that the doctor would not

undertake an examination when she was not ill, or to seek to establish a negative condition of no value.

In my view, not only is the evidence of what the wife did and said valueless and might indeed be misleading to the court, but it is not admissible. To what issue, it should be asked, does it go? It does nothing to prove the condition of either the female or male organ respectively of the parties alleged to be involved. It does nothing to disprove the intercourse the husband had alleged. The most that could be said is that the wife was showing a belief in her own story and adding some reason why the court should believe her. In this case I do not think the conduct and statement of the wife have that effect, but it is clear that a skilful witness might well embark on circumstantial matters to bolster up his or her story. Neville J.'s statement in *Jones v. South Eastern & Chatham Railway Co.*,¹⁴ cited by my Lord, "that "you are not entitled to give evidence of statements on other "occasions by the witness in confirmation of her testimony" neatly and accurately, in my opinion, states the law which is applicable to the question raised by the appellant.

Whether this rule is strictly logical or not, it is one which keeps the evidence to the main issues in dispute and tends to avoid deception of the court by a resourceful witness. Evidence is not a matter of mere logic. Evidence which is hearsay might well be relevant to the issues and of probative value, but is excluded and made inadmissible for practical considerations.

I agree entirely with Hodson L.J.'s opinion that the evidence was inadmissible and with his citation of authorities in support thereof. The wife's conduct and statement cannot, in my view, be regarded as revealing consciousness of innocence. They reveal at the most a consciousness that the doctor would not find any physical proof of guilt. I apprehend that the dishonest may be resourceful in giving an air of innocence to their transactions. To say "You can take my finger-prints" would establish nothing unless finger-prints for comparison were available. If the wife's statement in question was not admissible in her favour, the doctor's evidence of what the wife said was even more clearly inadmissible. Were it to be held otherwise, one wonders where ingenuity in bolstering up a witness's evidence would stop.

The idea of telephoning the doctor originated in this case not from the wife but from the lodger, the co-respondent, and after some discussion the parties got dressed and went out to a

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¹⁴ 87 L.J.K.B. 775, 779.

C. A. telephone kiosk. There was abundant time to weigh up the advantages of such a course and to prepare, if necessary, for the requested examination. I would hold that the appellant should succeed on the legal point of the inadmissibility of evidence, which was his sole ground of appeal, and that the commissioner's first view that the evidence was inadmissible was correct.

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Nevertheless, the appeal as a whole should be dismissed.

Appeal dismissed.

Solicitors: Haslewood, Hare, Shirley Woolmer & Co. for Mayo & Perkins, Eastbourne; Hart, Reade, Rippon, Dodd & Chatfield, Eastbourne.

A. W. G.

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July 12,
15, 22;
Dec. 19, 20.

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Husband and Wife—Divorce—Conflict of jurisdiction—Foreign decree based on last common residence—Decree to wife domiciled in England—Wife petitioner in fact resident for over three years in the foreign jurisdiction—Grounds of divorce alien to English law—Recognition of decree—Matrimonial Causes Act, 1950 (14 Geo. 6, c. 25), s. 18 (1) (b).

Conflict of Laws—Jurisdiction—Divorce—Comity—Recognition of foreign divorces—Wife's decree—Parties domiciled in England.

A wife domiciled in England obtained in Norway a Norwegian decree of divorce based upon a period of separation. The jurisdiction of the Norwegian tribunal was founded upon the fact that the last common residence of the parties had been in Norway, although the wife, a Norwegian by birth, had in fact been ordinarily resident in Norway for considerably more than three years before the decree. Upon a petition presented by the husband (who remained domiciled in England) for a declaration that the Norwegian decree was valid and the marriage thereby dissolved or, in the alternative, for a decree of divorce on the ground of desertion:—

Held, (1) that a petitioner cannot in such circumstances elect between seeking a declaration or a decree of divorce: the court must first determine whether the marriage is still in existence.

(2) That as the wife had in fact been ordinarily resident in Norway for a period of more than three years before her application for a divorce the marriage should be recognized upon a basis of reciprocity as having been validly dissolved by the Norwegian decree.

Travers v. Holley [1953] P. 246; [1953] 2 All E.R. 794; *Arnold v. Arnold* [1957] P. 237; [1957] 1 All E.R. 570; and *Robinson-Scott v. Robinson-Scott* [1957] 3 W.L.R. 842; [1957] 3 All E.R. 473 applied.

Fenton v. Fenton [1957] V.L.R. 17¹ not followed.

(3) And this was so although the grounds for the divorce were not grounds recognized in the English courts, for the ground of a divorce in the *lex fori* need not be taken into consideration so long as it does not offend against natural justice as conceived in the English courts.

(4) As the Norwegian court had accordingly had jurisdiction there was no jurisdiction in the English court to consider the husband's alternative plea for a divorce in this country, for the marriage had already been dissolved.

Per curiam. I am content in considering an obiter dictum of mine in *Arnold v. Arnold* [1957] P. 237, 253, in which I suggested that even less than three years' residence might be held to confer jurisdiction [to dissolve abroad a marriage upon the application of a wife domiciled in England], to follow the principle laid down by Karminski J. in *Robinson-Scott v. Robinson-Scott* (*supra*) that there must be at least three years' residence to found jurisdiction wherever the proceedings are brought.

PETITION by husband for a declaration that his marriage had been validly dissolved by a Norwegian divorce or, in the alternative, for a decree of divorce on the ground of desertion.

The parties were married in England in 1948 and made a home in Norway, which was the wife's country. The husband was at all times domiciled in England. In February, 1951,

¹ October 4, 1956: [1957] V.L.R. 17. The headnote reads: "F., whose domicile of origin was Victorian, acquired a domicile of choice in England and thereafter in 1932 married E. in England. Having deserted E. in England, he abandoned his domicile of choice and reverted to his Victorian domicile. In 1938 E. presented in England a petition for divorce on the ground of F.'s desertion. In 1949 a decree nisi was pronounced in that suit by the English court [April 13, 1949] and was made absolute. After the decree absolute, F. went through a form of marriage with S. in Sydney, and now he petitioned for a divorce from S.:—*Held*, the decree of the English court could not be recognized as valid, because it was not the court of the domicile.

"Although the English court had had jurisdiction to pronounce the decree by virtue of section 13 of the Matrimonial Causes Act, 1937 [section 18 (1) (a) of the Act of 1950], and although that section is similar to but not identical with section 75 of the Victorian Marriage Act 1928, this was not a reason for recognizing the decree. *Travers v. Holley* [1953] P. 246 not followed." The matter came before the Full Court (Herring C.J., Gavan Duffy and O'Bryan JJ.) on a case stated by Sholl J. pursuant to section 115 (2) of the Victorian Marriage Act, 1928. The case was not contested by the respondent, but the Attorney-General was represented. (No explanation was forthcoming for the delay in the English proceedings between 1938 and 1949.)

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the husband returned to England on the basis that the wife would join him when he had found employment and suitable accommodation; but she refused to do so, and in July, 1952, he signed, when visiting her in Norway, what he deemed merely a declaration that they were living apart, although it was in fact an application for a certificate of separation, a usual preliminary to a suit for divorce in Norway. This led to a Norwegian divorce being granted to the wife in February, 1955, in the circumstances set forth in the judgment, in which the other relevant facts are more fully considered.

H. S. Law for the petitioner. The declaration can be made on the basis of the principles of comity expressed in *Travers v. Holley*,² *Arnold v. Arnold*³ and *Carr v. Carr*.⁴ Moreover, if the petitioner, whose only wish is to have his status clarified, has made out a case of desertion on the basis that he has never understood the real meaning of the separation document which he signed, the English court can grant him as a domiciled Englishman a decree of divorce regardless of the position arising out of the Norwegian decree. It is unnecessary, if a petitioner is entitled to a finding of a matrimonial offence which will entitle him to a decree, first to have investigated the validity or otherwise in England of a foreign decree which purported to dissolve the marriage in another country. A petitioner may elect in such circumstances which remedy he will seek first.

[MR. COMMISSIONER LATEY Q.C. How can you say that if the marriage has been dissolved legally? If the dissolution is recognized by the English court what jurisdiction is there here to dissolve the marriage again? It cannot be done.]

[The case was adjourned for the assistance in argument of the Queen's Proctor, by which time Karminski J. had heard and determined *Robinson-Scott v. Robinson-Scott*.⁵ The commissioner drew the attention of the Queen's Proctor to *Fenton v. Fenton*,⁶ a case which had not been cited to Karminski J.]

Colin Duncan for the Queen's Proctor. Notwithstanding the principles in *Le Mesurier v. Le Mesurier*,⁷ which has provided for so long the test of jurisdiction in divorce, namely, domicile, the courts must now recognize the new principles of reciprocity

² [1953] P. 246; [1953] 2 All E.R. 794.

³ [1957] P. 237; [1957] 1 All E.R. 570.

⁴ [1955] 1 W.L.R. 422; [1955] 2 All E.R. 61.

⁵ [1957] 3 W.L.R. 842; [1957] 3 All E.R. 473.

⁶ [1957] V.L.R. 17.

⁷ [1895] A.C. 517; 11 T.L.R. 481.

arising from statutory encroachments on the rule such as those in section 18 of the Matrimonial Causes Act, 1950. The principles in *Arnold v. Arnold*⁸ and *Robinson-Scott v. Robinson-Scott*,⁹ although extending the principle in *Travers v. Holley*,¹⁰ are accepted; and there is no reason, in view of those authorities, to follow in this country the reasoning in *Fenton v. Fenton*.¹¹ [He referred also to *Lord Advocate v. Jaffrey*,¹² *Shaw v. Gould*,¹³ *Warden v. Warden*,¹⁴ *Dunne v. Saban*¹⁵ and *Carr v. Carr*.¹⁶]

Law, in reply, adopted the submissions of the Queen's Proctor.

[Reference was also made upon the issue of desertion at the earlier hearings to *Carlisle and Cumberland Banking Co. v. Bragg*,¹⁷ *Bagot v. Chapman*¹⁸ and *Crabb v. Crabb*.¹⁹]

MR. COMMISSIONER LATEY. This is a petition for a declaration of status presented in pursuance of R.S.C., Ord. 25, r. 5, and of the decision in *Travers v. Holley*,¹ which was to the effect that it would be contrary to principle if the English courts refused to recognize a jurisdiction which mutatis mutandis they claimed for themselves.

It is a petition dated April 3, 1957, formulated on alternative grounds, (a) for a direct declaration of the validity of a Norwegian decree of divorce, or (b) for an English decree of divorce on the grounds of desertion of upwards of three years by the wife respondent. In his final address Mr. Law, on behalf of the petitioner, abandoned this latter plea.

The petitioner, Derrick Ernest John Manning, aged 31 years, of Fulbourn Road, Cambridge, who has always been domiciled in England, was married on June 22, 1948, at the Cambridge register office, to a Norwegian girl, Elna Nilsen. There has been no issue of the marriage. In September, 1948, the wife went to Norway. The husband followed her in December, 1948, and in May, 1949, he obtained employment in that country at a place some 50 miles from Ervik, where she was living. He saw her at regular intervals, but gave up his job in the summer of 1950 and returned to England in February, 1951, on the basis that she

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⁸ [1957] P. 237.⁹ [1957] 3 W.L.R. 842.¹⁰ [1953] P. 246.¹¹ [1957] V.L.R. 17.¹² [1921] 1 A.C. 146; 36 T.L.R. 820.¹³ (1868) L.R. 3 H.L. 55.¹⁴ 1951 S.C. 508.¹⁵ [1955] P. 178; [1954] 3 All E.R. 586.¹⁶ [1955] 1 W.L.R. 422.¹⁷ [1911] 1 K.B. 489.¹⁸ [1907] 2 Ch. 222; 23 T.L.R. 562.¹⁹ (1868) L.R. 1 P. & M. 601.¹ [1953] P. 246; [1953] 2 All E.R. 794.

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should join him after he had obtained employment and suitable accommodation in England. When he had done so he wrote several times to her asking her to join him, but she did not come. In July, 1952, he went over to see her, and met her at Bergen. She said that she did not want to live with him any more and wanted a divorce, and they stayed at separate hotels. He demurred to her proposal and for several days tried to persuade her to change her mind, which she refused to do. The husband has told me that she had told him that she would not live in England. At her request he saw a Norwegian lawyer and signed a document written in Norwegian, dated July 24, 1952, which he understood was a declaration that he and his wife were living apart. He did not understand that it was an agreement to live apart. This document, which has been put in, was in fact an application for a certificate of separation, which is a usual preliminary to a suit for divorce in Norway. The document was signed by both parties, and the last paragraph reads: "We are "applying for a separation certificate in accordance with the Law "of May 31, 1918, No. 2, paragraph 41." The next day the husband returned to England, and since that time he has not seen his wife nor had any letter from her. About three weeks later he received a copy of the certificate of separation dated August 6, 1952. That translated reads as follows: "Separation "certificate. The sheriff of Bergen and Hordaland County makes "known: That Derrick Ernest John Manning, laboratory "assistant, and Elna Manning (housewife), née Nilsen, both of "Aasane, have applied for a separation certificate and that "mediation as required by law has taken place according to the "certificate issued by Johannes Gulbranson (vicar) Bergen "July 24, 1952. In accordance with the law of May 31, 1918, "No. 2, paragraph 41, and the law of June 25, 1937, such a "certificate is hereby granted. This certificate does not give the "right to enter into a new marriage." Then there is the name of the sheriff and the witness.

Apparently the husband did nothing for many months until in 1954 he became anxious about his legal position, and on September 27 of that year he wrote to the Norwegian legal authorities as follows: "On August 6, 1952, you granted a"—then followed the Norwegian word for "separation"—"to my "wife Elna Manning of Ervik in Aasane and to myself. I "would like to know whether this order is still valid and, if so, "can I withdraw my consent." He was, of course, referring to the certificate. On October 1, 1954, a reply was sent to him

saying: "The separation certificate dated August 6, 1952, is still "valid provided that both parties have since lived apart. The "certificate only becomes null and void if and when both parties "are in agreement to live together again."

On November 17, 1954, he received a letter from the Norwegian consul-general at London stating that an application had been made by Mrs. Manning in Norway for a divorce. The date of the wife's application does not appear from the Norwegian court papers, but for reasons explained hereafter it could not have been made before the expiry of two years after the date of the certificate of separation, that is, not before August 6, 1954. By that time the wife had been continuously resident in Norway since 1948, about five or six years.

The consul-general invited Mr. Manning to attend at his office. Mr. Manning replied that he was not agreeable to the proposed divorce and did not accept the invitation. The consul-general wrote to him on December 14, 1954, as follows: "When "such a legal separation has been in force for one year without "cohabitation having been resumed, Norwegian law provides that "both parties, if in agreement, can apply for divorce." The consul-general added that Mrs. Manning required Mr. Manning's signature to the petition.

On April 28, 1955, following a further inquiry by the husband, the consul-general sent him a copy of a decree of divorce granted by the county governor of Bergen, dated February 17, 1955. Translated this reads: "In accordance with the Matrimonial "Law of May 31, 1918, paragraph 43, first section, second "period, a decree of divorce is hereby granted to"—and then the husband and wife are mentioned by name—"The decree of "divorce is final. Signed at Bergen, February 17, 1955." In fact, this judgment, as was indicated in another document attached to the decree, could be made the subject of appeal within three weeks, but that period had expired long before the husband became aware of the decree.

From these facts two issues arose: first, was this document he signed a consensual agreement for separation which would have terminated any desertion on the part of the wife? That would affect the alternative plea of the petitioner in this case if this court were to find that the Norwegian decree was invalid for want of jurisdiction. The second issue was: the husband being always domiciled in England according to English law, was the Norwegian decree of divorce valid? If the answer to this second question were in the affirmative, the first point does not arise.

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Mr. A. D. Hald, a Norwegian lawyer, gave expert evidence that in Norwegian law the decree in Norway is valid. The last common residence of the spouses (in this case Norway) was sufficient to found jurisdiction in that country. If spouses were separated and a certificate of separation were issued by the competent legal authority and separation continued for two years thereafter the Norwegian court could grant either party a divorce. He told me that this was laid down by a subsection of the Norwegian Matrimonial Law of May 31, 1918, paragraph 43, which was actually referred to in the decree. That subsection translated reads: "If the separation has existed for at least two years then either of the parties can demand a divorce." Mr. Hald made it clear that at least two years of continuous separation must follow the date of the certificate of separation to qualify one of the parties only to petition. He told me that in Norwegian law the English conception of domicile to found jurisdiction did not operate—it was the last common residence of the spouses—and, moreover, if a Norwegian woman married an Englishman she would lose her Norwegian citizenship on leaving the country, but if she stayed in Norway she would still be domiciled there. By that I have assumed that Mr. Hald was saying that she would not lose the jurisdiction of the Norwegian tribunal in a divorce suit. He further informed me, with regard to a hypothetical converse position, that if a man were domiciled according to the English conception in Norway and his wife came to England, and if she had lived here for three years or more, and she satisfied the English court that her husband had deserted her for upwards of three years, and she was granted a divorce here, that in such case the Norwegian court would recognize the English decree as valid. Mr. Hald also stated that the Law of May 31, 1918, No. 2, paragraph 45, provided another ground of divorce in Norway, malicious desertion for two years or more, but it was rarely employed, as 99 per cent. of the desertion cases were based on three years' actual separation. Having examined the documents in connexion with the Norwegian divorce in this case, Mr. Hald also expressed the opinion that in the circumstances surrounding the signature of the husband of the application for the certificate of separation the Norwegian court was undoubtedly justified in regarding it as an assent by him to the agreement to separate, and the only point there is that one has to see if the Norwegian court exercised its jurisdiction in accordance with its own procedure as laid down by law.

On these facts, including the Norwegian law, Mr. Law, for the petitioner, has submitted that this Norwegian decree of divorce should be accepted as valid according to the principle laid down in *Travers v. Holley*,² which laid down a principle which hitherto was new in English law. It is unnecessary to review in detail the cases implementing or declining to apply that decision, because they have been cited in previous judgments of this court, for example, in *Arnold v. Arnold*³ (wherein a Finnish decree of divorce was recognized in the case of a petitioner domiciled in England), and in the very recent case of *Robinson-Scott v. Robinson-Scott*.⁴ In that last case Karminski J. recognized the validity of a Swiss decree of divorce at Zurich granted to a Swiss wife married to an Englishman domiciled in England, and the decree was granted on the basis of the wife's having a separate domicile for the purposes of divorce according to the Swiss code, she having been resident for five years within the jurisdiction. The Zurich court in 1953 pronounced a decree of divorce on the ground that the matrimonial relations between the parties were deeply and irreparably disrupted. Thus, neither the basis of jurisdiction nor the ground of divorce had their actual equivalent in English law. Karminski J. held that where in fact there has been three years' residence by a wife in the territory of the foreign court assuming jurisdiction in a suit for dissolution, the English courts will accept that as a ground for exercising jurisdiction, because it would itself accept jurisdiction on proof of similar residence in England.⁵ "It is not essential for recognition by this court that the foreign court should assume jurisdiction on the grounds laid down by section 18 of the Matrimonial Causes Act, 1950. It is sufficient that facts exist which would enable the English courts to assume jurisdiction. I find that the Zurich court here had jurisdiction and that the decree pronounced by that court in favour of the wife on July 3, 1953, was valid. Accordingly, I declare that the marriage between the husband and the wife was validly dissolved on July 3, 1953, by the decree and judgment of the District Court of Zurich."

Karminski J. referred in his judgment to an obiter dictum of mine in *Arnold v. Arnold*,⁶ in which I suggested that even less than three years' residence might be held to confer jurisdiction

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² [1953] P. 246.³ [1957] P. 237; [1957] 1 All E.R. 570.⁴ [1957] 3 W.L.R. 842; [1957] 3 All E.R. 473.⁵ [1957] 3 W.L.R. 842.⁶ [1957] P. 237, 253.

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if such a length of time founded jurisdiction in some other country according to the law of that country. Karminski J. said on that point in *Robinson-Scott v. Robinson-Scott*⁷: “Whatever “may have been the motive of the legislature in insisting on “three years’ residence under section 18 (1) (b) of the Matrimonial Causes Act, 1950, I cannot agree with Mr. Commissioner Latey that the period of residence demanded by the law “of the foreign court to found jurisdiction is immaterial. If “similarity is the basis of recognition, there must be similarity “in fact though not in terminology. There seems to be a “profound difference between the two years’ residence in Florida “found in *Dunne v. Saban*,⁸ and the residence of five years and “upwards in Zurich in the present case.”

I am content to follow the principle which Karminski J. had laid down, that is, that there must be at least three years’ residence to found jurisdiction wherever the action is brought.

Like his Lordship in that case, I have had the benefit of the argument of Mr. Colin Duncan for the Queen’s Proctor, and in substance he has submitted that this case comes within the decision in *Robinson-Scott v. Robinson-Scott*⁹ and the principle of *Travers v. Holley*¹⁰; and he has made it clear that in supporting that view he has accepted, as of course the court must, the decision of Karminski J. in *Robinson-Scott v. Robinson-Scott*.¹¹

Mr. Duncan, with his usual thorough method, took me through all the authorities, beginning with *Le Mesurier v. Le Mesurier*,¹² and the various cases following *Travers v. Holley*.¹³ He pointed out the drastic inroad made into the rigid rule of domicile as the sole test of jurisdiction effected by what is now section 18 (1) (b) of the Matrimonial Causes Act, 1950, by which three years’ ordinary residence by a wife in England enables her to present a petition here although her husband is domiciled abroad.

Mr. Duncan referred me to *Fenton v. Fenton*,¹⁴ an Australian case, in which the full Supreme Court of Victoria, a tribunal whose decisions command the greatest respect in this country, has refused to accept the principle in *Travers v. Holley*,¹⁵ on the ground that the old decisions in *Le Mesurier v. Le Mesurier*¹⁶

⁷ [1957] 3 W.L.R. 842, 849.

¹² [1895] A.C. 517; 11 T.L.R. 481.

⁸ [1955] P. 178; [1954] 3 All E.R. 586.

¹³ [1953] P. 246.

⁹ [1957] 3 W.L.R. 842.

¹⁴ [1957] V.L.R. 17.

¹⁰ [1953] P. 246.

¹⁵ [1953] P. 246.

¹¹ [1957] 3 W.L.R. 842.

¹⁶ [1895] A.C. 517.

and subsequent cases in the House of Lords have established a principle of sole jurisdiction, namely, the domicile of the husband, from which no court can depart unless there be legislation to the contrary. Mr. Duncan pointed out that this court here is no more bound by a decision of the Victorian court than that court is bound by a decision of the English Court of Appeal.

I would venture to say, however, that the decision in *Le Mesurier v. Le Mesurier*,¹⁷ made by the Judicial Committee of the Privy Council so as to set the seal on a doctrine which was never before so clearly laid down, that is to say, that domicile was the sole test of jurisdiction in divorce, was judge-made law. So was the Court of Appeal's decision in *Travers v. Holley*,¹⁸ which actually sprang from the statutory jurisdiction laid down in section 18 of the Matrimonial Causes Act, 1950. When I say sprang from that section, I mean that the court took into account the changed circumstances brought about by that section.

One of the matters which gave me serious food for thought in this case was the fact that, although all the early decisions in connexion with *Travers v. Holley*¹⁸ deal with a ground of divorce common to all the countries concerned, that is, desertion, in this case the Norwegian court granted a divorce on the ground of mutual separation, a ground unknown to the English law. I ventured to suggest in *Arnold v. Arnold*¹⁹ that once jurisdiction was established the particular ground of divorce was beside the point. I am encouraged in that view by the decision of Karminski J. in *Robinson-Scott v. Robinson-Scott*²⁰ that the Swiss decree was valid though the ground of the divorce was unknown to the English law. He also very succinctly put the point in a sentence that I have already quoted²¹: "It is not essential for recognition by this court that the foreign court should assume jurisdiction on the grounds laid down by section 18 of the Matrimonial Causes Act, 1950." Section 18 (1) (b) provides that "in the case of proceedings for divorce or nullity of marriage, if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man," the wife may petition in this country. Therefore, on this question

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¹⁷ [1895] A.C. 517.¹⁸ [1953] P. 246.¹⁹ [1957] P. 237.²⁰ [1957] 3 W.L.R. 842.²¹ Ibid.

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of grounds for divorce it should be taken as an established principle that the ground of a divorce in the *lex fori* need not be taken into consideration in cases of this kind, so long as it does not offend against natural justice as conceived in the English court.

In this case, therefore, we find the reciprocity of jurisdiction contemplated by the Court of Appeal in *Travers v. Holley*,²² and that principle should be applied, the wife having continuously resided in Norway for well over five years before the application for divorce.

I accordingly make the declaration sought, that the marriage of the petitioner with the respondent was validly dissolved by the Norwegian decree in 1955. This marriage having been dissolved in 1955 the plea for divorce falls by the way, and it is unnecessary for me to pass to the issue of desertion.

Declaration accordingly.

Solicitors: *Vizard, Oldham, Crowder & Cash, for Wild & Hewitson, Cambridge; The Queen's Proctor.*

J. B. G.

²² [1953] P. 246.

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Hodson and
Pearce L.JJ.
and
Harman J.

Husband and Wife — Divorce — Appeal — Costs — Decree — Party cited mulcted in costs — Disclosure of successful party's adultery after granting of decree absolute — Appeal against order as to costs — Whether such appeal lies after decree has been made absolute — Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), ss. 31 (1) (e), 184 — Matrimonial Causes Rules, 1957 (S.I. 1957, No. 619 (L.4)), r. 69 (2).

Husband and Wife — Practice (in matrimonial causes) — Costs. Fraud — Fraud on court.

A husband, whose wife had petitioned for divorce on the ground of his alleged cruelty, cross-petitioned on the ground of the wife's admitted adultery with the party cited. After a six-day hearing, mainly on the issue as to cruelty, the commissioner dismissed the wife's petition, granted the husband a decree nisi, and ordered that the party cited should pay all the husband's costs. Two months after the decree had been made absolute, and both parties had

married again, the party cited applied to the commissioner for leave to appeal against the order as to costs, supporting his application by fresh and undisputed evidence that the husband had before the hearing of the petition himself been guilty of adultery which he had concealed from the court. Leave to appeal was granted by the commissioner, and on a motion to the Court of Appeal for leave to appeal out of time and to adduce fresh evidence, and on the appeal by the party cited:—

Held, varying the order of the commissioner, that each party should bear his own costs, since a party who had concealed a material fact of this nature from the court ought not to be permitted to obtain an advantage from his deceit.

An appeal may lie from an order as to costs by leave of the court after the decree nisi has been made absolute, despite the restriction on appeals after decree absolute contained in section 31 (1) (e) of the Supreme Court of Judicature (Consolidation) Act, 1925,¹ for an appeal against the order as to costs is not an appeal against the decree absolute. The form of the decree nisi and rule 69 of the Matrimonial Causes Rules, 1957,² recognize that the order as to costs is distinct from the order nisi dissolving the marriage and is not so ancillary to it as to merge with it in the decree absolute.

Semble. The general principles applicable to all motions for leave to adduce fresh evidence are equally applicable to such a motion by a party to divorce proceedings who has not had "time and opportunity" to appeal until after a decree of divorce has been made absolute, despite the restriction on such appeals in section 31 (1) (e) of the Act of 1925.

APPEAL from Mr. Commissioner Blanco-White Q.C.

A wife filed a petition in 1955 for the dissolution of her marriage on the ground of her husband's alleged cruelty. She admitted that she had herself been guilty of adultery with one

¹ Supreme Court of Judicature Act, 1925, s. 31: "(1) No appeal shall lie— . . . (e) from an order absolute for the dissolution or nullity of marriage in favour of any party who having had time and opportunity to appeal from the decree nisi on which the order was founded, has not appealed from that decree; . . ."

S. 184: "(1) As soon as any decree for divorce is made absolute, either of the parties to the marriage may, if there is no right of appeal against the decree absolute, marry again as if the prior marriage had been dissolved by death or, if there is such a right of appeal, may so marry again, if no

"appeal is presented against the decree, as soon as the time for appealing has expired, or, if an appeal is so presented, as soon as the appeal has been dismissed: . . ."

² Matrimonial Causes Rules, 1957, r. 69: "(2) An order for payment of costs contained in a decree nisi, if drawn up before the decree is made absolute, shall direct payment into court, and, unless otherwise directed, such costs shall not be paid out of court until the decree has been made absolute, but a wife who is unsuccessful in a cause and who at the trial has obtained an order for costs may proceed forthwith to obtain payment of the amount allowed on taxation."

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Gilder during the year preceding the presentation of her petition, and asked for the discretion of the court to be exercised in her favour. The husband by his answer, delivered some time later, denied the cruelty alleged, and cross-petitioned for divorce on the ground of his wife's admitted adultery with Gilder in the matrimonial home from April to November, 1954, and thereafter at another address; and Gilder was joined in the proceedings as the party cited. By his pleading the party cited alleged that the cruelty of the husband had conduced to the wife's adultery.

During the six-day hearing of the petition the main issue contested was that between husband and wife on the charge of cruelty, though the party cited gave such evidence as he could to support that charge. The commissioner at the conclusion of the hearing dismissed the wife's petition and granted the husband a decree nisi on the ground of the wife's adultery. He ordered that the party cited should pay the whole of the husband's costs. The decree nisi, drawn up on March 7, 1957, contained, in addition to the words dissolving the marriage, the provision as to the costs and also a provision as to the custody of the five children of the marriage. The decree nisi was made absolute on April 25, 1957.

The question of the custody of the children was contested and was accordingly adjourned into chambers. For the purpose of those proceedings the former husband and the woman whom he married after the decree was made absolute swore affidavits to show that they were fit persons to have the custody of the children. The first wife, the mother of the children (who had also since the decree absolute married the party cited), carried out investigations, and discovered, in June, 1957—two months after the decree had been made absolute—that her former husband had committed adultery on three occasions before the hearing of the petition with the woman whom he had married after the decree absolute, and that on May 27, 1957, the woman had given birth to a child of whom he had acknowledged himself the father on the child's birth certificate.

The party cited thereupon applied *ex parte* to the commissioner on July 23, 1957, for leave to appeal out of time against the order as to costs made against him. His application was supported by an affidavit by the wife setting out the newly discovered facts. The commissioner granted the leave asked for and stated that had he known the facts now brought to his attention he would have made a different order as to costs.

The party cited thereupon applied to the Court of Appeal *ex parte* on July 29, 1957, for leave to appeal out of time and for leave to adduce fresh evidence, namely, evidence that the husband had concealed from the commissioner the fact that he had himself been guilty of adultery. The court adjourned its decision on the motion to the hearing of the appeal on its merits, and extended the time for appeal. On the resumed hearing the court also had before it an affidavit by the former husband in which he admitted that he had been guilty of adultery and tendered his apology to the court for concealing it from the commissioner, praying in extenuation his anxiety of mind over the impending trial and money matters. The court granted leave to adduce the fresh evidence, and the appeal on the merits was heard at the same time.

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Anthony Lincoln (for *F. M. Drake*) for the party cited. There should be a different order as to costs, for it is important in the public interest that a man who has deceived the court on a material fact of this nature should not be left in the fortunate position of having the party cited pay for the trial. The husband's deceit is not far removed from perjury, since it is now customary and proper for a party asking for a decree to disclose his own adultery and ask for the discretion of the court to be exercised in his favour.

Eric Falk for the husband. On the merits, the party cited ought to be condemned in costs, for his adultery, which began in the matrimonial home, led directly to the break-up of this married life. Moreover, since the party cited joined issue on the wife's petition on cruelty which failed, it is right that he should pay the costs of the hearing on that issue.

[*HARMAN J.* The contest between the parties would have taken as long and would have been exactly the same as it was if the party cited had not joined in it at all.]

From the objective point of view the court might consider that this husband's deception of the court was no more reprehensible than the behaviour of the party cited in deceiving the husband as he did.

[*HODSON L.J.* This is not a question of comparison but of whether a party who deceives the court should get his costs.]

On the law, it is submitted that the court is precluded by the provisions of section 31 (1) (e) of the Judicature Act, 1925, from interfering with this order as to costs now that the decree has been made absolute. The cause of action here was the petition

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for divorce; and the order for costs, which was part of the decree nisi, does not give an independent cause of action, but is so ancillary to the decree nisi as to merge with it in the decree absolute. There is no appeal from a decree absolute unless a party has not had "time and opportunity" to appeal before it was made absolute; and those words should be given a very limited and narrow construction, limited to physical time and opportunity, and not be applied to a case such as this where the applicant can only say: "If I had known then what I know now "I would have appealed." The only reported cases in which the scope of those words have been considered since the passing of the Act of 1925 support a narrow construction. In *Everitt v. Everitt*³ an appeal was allowed because the petition was a nullity as it had never been served on the husband; and in *O'Neill v. O'Neill and Pigott*⁴ the court held that an application to appeal after decree absolute against an order for damages was not caught by section 31, because the petition for damages was independent of, and not ancillary to, the suit for divorce. But Bucknill L.J.⁵ said that if the section had applied, it would bar the right to appeal against damages. That is the position here, for the order for costs has no independent existence apart from the decree nisi of which it is part.

[HODSON L.J. The order for custody made on this decree nisi has some bearing on the present question. It is quite independent of the decree nisi, and the decree absolute has no effect on it.]

The order for custody is kept alive by the invariable practice of the court to refer custody proceedings to chambers; but it is ancillary to the decree nisi, as is the order as to costs.

[HODSON L.J. If that is correct, there would be no need for rule 69 of the Matrimonial Causes Rules, 1957, which postpones the liability to pay costs.]

The rule is necessary just because the right to costs does not enure to the successful party until after the decree absolute. It is prayed in aid in support of the present submission as to the nature of an order for costs.

The general principles on which the court acts in considering motions to admit fresh evidence, stated in *Braddock v. Tillotson's Newspapers Ltd.*,⁶ require that the new evidence must be shown

³ [1948] W.N. 345; 65 T.L.R. 121; [1948] 2 All E.R. 545.

⁴ [1949] W.N. 394; 65 T.L.R. 624; [1949] 2 All E.R. 649.

⁵ [1949] 2 All E.R. 649, 650.

⁶ [1950] 1 K.B. 47; 65 T.L.R. 553; [1949] 2 All E.R. 306.

to be such that it would materially have affected an issue at the trial; but fresh evidence ought not to be admitted on the same principles in divorce proceedings after a decree has been made absolute, for section 31 is administered in the public interest to restrict within the narrowest limits the right to upset a change of status which may take place under the provisions of section 184 of the Act of 1925, giving to parties to a decree absolute the right to remarry. "Time and opportunity" should not be construed to extend to a case such as this.

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HODSON L.J. stated the facts and continued: The trial lasted a very long time, but the party cited did not increase the length of the trial except so far as he supported it by his conduct in his pleading, and by such evidence as he was able to give in support of the wife's case. However that may be, in the exercise of his discretion the commissioner made that order which involved the party cited in a very substantial liability as to costs.

The decree nisi pronounced on that day was made absolute on April 25, but it was not until July, 1957, that the wife discovered what is now, and has been since its discovery, an undisputed fact, namely, that the husband had committed adultery with another woman and had committed adultery with that other woman before the hearing. In fact he was living with her and on May 27, 1957, she gave birth to a child, which must have been conceived before the hearing, of which the husband has declared himself over his own signature to be the father. The husband had never disclosed this fact to the court. He has never pretended that he did not realize that his own adultery which had been committed was a relevant matter for the court's consideration, and he does not seek to say that he did not grossly deceive the court in regard to the concealment of this matter. It is not that he has committed perjury. He was not asked to swear one way or the other about this matter either in the interlocutory proceedings or when the suit was tried. But he has kept back this fact and misled the commissioner into believing a state of facts existed which did not exist, namely, that the wife had committed adultery, whereas he had not, the fact being that they had both committed adultery. Indeed, he so far misled the commissioner as to lead him to say in his judgment that, so far as he could see, the husband's attachment to the wife remained intact up to that moment, whereas the truth was that he had set up another establishment with another woman.

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It would be wholly wrong for this court to lend countenance to such deception by giving the husband any relief, in those circumstances, against the party cited. The decree absolute stands, and it cannot be altered or appealed against. Of course, the case might have taken many different courses if this adultery had been disclosed. The petition might have been dismissed. It may be that that was the reason why the husband kept this matter back. A decree nisi might have been made against him. He might have been anxious to avoid that consequence because he thought that he might have a better chance in the proceedings for custody which ensued—there are five children—if he had not himself been found guilty of having committed adultery. A decree might have been made in favour of both parties, and, as happened here, a different approach might have been made on the question of costs. The commissioner made it clear that if he had found that this man had committed adultery, let alone if he had been told at the last minute at the end of his judgment, or immediately before giving his judgment, he would not have condemned the party cited in costs.

I should point out that no blame is to be attached in any way to the commissioner, who acted on the materials that he had before him. He was grossly deceived. The court was deceived, and it has now been enlightened. It has now to do what it can to put the matter right by altering the order in the way the appellant asks and make no order as to costs, leaving each party to bear his own costs.

There was an objection made on behalf of the respondent to this appeal that in any event this court could not take any such course, and I must consider that. It depends on a section of the Supreme Court of Judicature (Consolidation) Act, 1925, which is designed to prevent appeals from decrees absolute. Section 31 (1) (e) of that Act provides that there shall be no appeal “from “an order absolute for the dissolution or nullity of marriage in “favour of any party who having had time and opportunity to “appeal from the decree nisi on which the order was founded, “has not appealed from that decree.” This is not an appeal from a decree absolute. That is the answer to that contention; the contention being that, although this is not a direct appeal from a decree absolute, it is an appeal from a decree nisi, and that this was merged in the decree absolute, and, accordingly, that the order for costs contained in the decree nisi is in effect part of the decree absolute. I find it difficult to follow that argument, and I am quite unable to accept it. If one looks at the

form of the decree nisi itself it becomes absolute under the present procedure without any order. It is divided into several parts, only one of which is the order nisi, namely, that part which dissolves the marriage. It contains other provisions, one of which is a provision as to costs, and another of which is a provision as to the custody of children. The decree nisi is not made operative until it is made absolute and that takes place nowadays by a more or less automatic process unless there is any intervention. But I do not accept the argument that the order for costs is in such a way ancillary to the decree nisi as to merge with it in the decree absolute. The taxation takes place on the direction given in the decree nisi itself. So far as I can see, if a decree nisi is awarded without any limitation as to taxation, there would be no objection to taxing costs thrown away if the decree nisi had not been made absolute. But the Matrimonial Causes Rules, 1957 [rule 69] provide for the order for payment of costs contained in the decree nisi, if it is drawn up before the decree nisi is made absolute, to direct payment into court, which indicates, to my mind, that the court in these rules was alive to the difference between the order for costs and the decree which was what actually dissolved the marriage.

I think there is no substance in the point. It is unnecessary to consider further whether the appellant here had "time and opportunity" to appeal from the decree nisi. If it is necessary so to decide, I am inclined to the view that it would be right to say on the material we have had before us that the appellant had no "time or opportunity" to appeal against this decree. Indeed, I am of opinion that the same principles should be adopted in dealing with applications of this kind as are adopted in all applications to an appellate court when the question whether or not fresh evidence should be allowed is before the court. Following these principles the fresh evidence should be admitted. I would therefore allow the appeal.

PEARCE L.J. I agree. In my view, the restriction on appeals contained in section 31 (1) (e) of the Supreme Court of Judicature (Consolidation) Act, 1925, has no application here. This is not an appeal against an order absolute. It is an appeal against an order for costs made on a decree nisi. The natural meaning of the words in section 31 (1) (e) does not restrict such an appeal: nor do I think that *O'Neill v. O'Neill and Pigott*,¹ to which we have

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¹ [1949] W.N. 394; 65 T.L.R. 624; [1949] 2 All E.R. 649.

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been referred, compels us to put a gloss on the words "appeal from an order absolute."

I, too, if it were necessary, would be inclined to hold that in this case the appellant had no opportunity for appealing from the decree nisi since the true facts were concealed from him by the deceit of the respondent.

So far as the merits are concerned, the respondent concealed his adultery from the court in order to obtain from it a decree as of right instead of a decree in the discretion of the court. Part of the fruit of that deceit is the order for costs, and now that that deceit has been discovered, it seems to me wrong that the order should stand. For these reasons, I agree that the appeal should be allowed.

HARMAN J. I agree. It must be a universal rule in all divisions of the court that serious notice will be taken of attempts to deceive it. It would be contrary to all principle to allow a litigant who has deceived, and deliberately deceived, the court to obtain from that deceit an advantage which, if the truth had been known, he would never have had. That is the reason why the appeal should be allowed.

As to the point of law, it seems to me that is answered, as my Lord [Hodson L.J.] has said, by the simple submission that it is not the fact that this is an appeal from an order absolute, and that is the end of it.

Appeal allowed with costs, to be limited to the sum of £24, payable by four monthly instalments of £6 each, the first payment to be one month from today: certificate to the respondent for legal aid.

Solicitors: *Field, Roscoe & Co. for Cave & Co., Luton; Peacock & Goddard for Cooke & Sons, Luton.*

M. M. H.

GILBERT v. GILBERT AND ABDON
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Nov. 13, 14,
15, 18, 19.

Sachs J.
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Husband and Wife—Practice (in matrimonial cases)—Submission of no case—Divorce—Submission of no case by intervener—Election—Matrimonial Causes Act, 1950 (14 Geo. 6, c. 25), s. 5.

In the exercise of its powers under section 5 of the Matrimonial Causes Act, 1950,¹ the court has an unfettered discretion to decide whether or not to put counsel who invokes the section to his election, and is not subject to any rule of practice that counsel must automatically be put to his election.

Alexander v. Rayson [1936] 1 K.B. 169; 52 T.L.R. 131; *Yuill v. Yuill* [1945] P. 15; 61 T.L.R. 176; [1945] 1 All E.R. 183 and *Beal v. Beal* (*Reade cited*) [1953] 1 W.L.R. 1365; [1953] 2 All E.R. 1228n. considered.

DEFENDED PETITION for divorce.

The husband in his petition alleged that his wife had committed adultery with the co-respondent; the wife in her answer admitted the adultery but alleged that the husband himself had previously to such adultery committed adultery with the intervener and that (1) his adultery was, inter alia, misconduct conducing to her adultery, and (2) she be entitled to a decree on her answer on the ground of his adultery. At the trial counsel for the intervener sought to make a submission of no case to answer under section 5 of the Matrimonial Causes Act, 1950.¹

Joseph Jackson for the intervener. The discretion given to the court by section 5 of the Act of 1950 is quite independent of the common law practice established in *Alexander v. Rayson*² that a party who wishes to make a submission of no case must be put to his election. The question under consideration in *Yuill v. Yuill*³ was whether the rule in *Alexander v. Rayson*⁴ applied to the Divorce Court in the circumstances of that case; the

¹ Matrimonial Causes Act, 1950, s. 5: "In any case in which, on the petition of a husband for divorce on the ground of adultery, the alleged adulterer is made a co-respondent or in which, on the petition of a wife for divorce on the ground of adultery, the person with whom the husband is alleged to have committed adultery is made a respondent, the court may, after the close of the evidence on the part of the peti-

tioner, direct the co-respondent or the respondent, as the case may be, to be dismissed from the proceedings if the court is of opinion that there is not sufficient evidence against him or her."

² [1936] 1 K.B. 169; 52 T.L.R. 131.

³ [1945] P. 15; 61 T.L.R. 176; [1945] 1 All E.R. 183.

⁴ [1936] 1 K.B. 169.

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question of the position under section 5 when a submission of no case to answer was made on behalf of the co-respondent or intervener was not considered. Mr. Commissioner Latey Q.C. adopted the right course in *Beal v. Beal* (*Reade cited*)⁵ when he allowed counsel to make a submission of no case under the section without putting him to his election. It is true that he then resiled from this course in his judgment and thought that the section might be obsolete. It is submitted that in this respect he was wrong.

R. J. A. Temple Q.C. and *Colin Sleeman* for the petitioner [in answer to a question put to him by the judge]. It is intended to put the question to the husband in the course of examination-in-chief whether he had committed adultery with the intervener. No reliance will be placed on section 32 (3) of the Matrimonial Causes Act, 1950.⁶

W. A. L. Raeburn Q.C. and *Maurice Share* for the respondent.

SACHS J. This is not the first occasion on which an application by a co-respondent or intervener has been made to me in similar circumstances. The last such application was in *Hopper v. Hopper*¹ at Leeds Assizes in July, 1955. There is, however, apparently no direct decision on the point so far as it concerns co-respondents and interveners, though there is a very helpful analysis of the origin of section 5 of the Act of 1950 by Mr. Commissioner Latey in *Beal v. Beal* (*Reade cited*).² Mr. Temple, to whom I put the question as *amicus curiae*, was unable to bring to mind any case since *Yuill v. Yuill*,³ where a co-respondent or intervener had been dismissed from the suit at the stage now under consideration. On the other hand, there is the recent case in New Zealand of *Mattina v. Mattina*,⁴ where the court, on parallel provisions in their Matrimonial Causes Acts, dismissed a co-respondent from the suit.

⁵ [1953] 1 W.L.R. 1365; [1953] 2 All E.R. 1228n.

⁶ Matrimonial Causes Act, 1950, s. 32 (3): "The parties to any proceedings instituted in consequence of adultery and the husbands and wives of the parties shall be competent to give evidence in the proceedings, but no witness in any such proceedings, whether a party thereto or not, shall be liable to be asked or be bound to answer any

"question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery."

¹ July, 1955; unreported.

² [1953] 1 W.L.R. 1365; [1953] 2 All E.R. 1228n.

³ [1945] P. 15; 61 T.L.R. 176; [1945] 1 All E.R. 183.

⁴ [1957] N.Z.L.R. 440.

As the evidence in the case before me, in so far as it concerns the alleged adultery of the intervener, is of a type which merits the court's attention being directed to the provisions of the above section 5, it becomes necessary, before examining that evidence, to consider what is the correct approach to Mr. Jackson's application, having regard to *Alexander v. Rayson*,⁵ *Yuill v. Yuill*,⁶ and the observations of Mr. Commissioner Latey in *Beal v. Beal* (*Reade cited*).⁷

Section 5 of the Matrimonial Causes Act, 1950, being part of a recently consolidated statute, it is clear that it remains effective; and I doubt whether that part of the judgment of Mr. Commissioner Latey in *Beal v. Beal* (*Reade cited*) which is phrased,⁸ "I have now come to the conclusion that the section is really "obsolete," was meant to convey anything more than that, under modern practice, the occasions in which the discretion conferred by the section will be exercised in favour of an intervener are likely to be somewhat rare.

To my mind, section 5 of the Matrimonial Causes Act, 1950, gives the court a statutory discretion under which in suitable cases it may in future, as in the past, dismiss a co-respondent or an intervener at the conclusion of the evidence of the party seeking to make a case of adultery against that co-respondent or intervener. Nothing in the way of a rule of practice could prevail against the provisions of that section or take away that discretion from the courts: whether or not to put a co-respondent or intervener to election as to calling evidence must depend on the circumstances of the case under consideration.

The factors which have to be taken into account when applying one's mind to the question of discretion must, of course, include those which the authorities show to be the basis of the decisions in *Alexander v. Rayson*⁹ and the cases which followed it. High amongst the factors to be taken into account is the danger of causing litigation to be made additionally expensive and additionally protracted where the judge has to make a ruling in a borderline case such as the one now before me. Another, and to my mind a cogent, factor is the danger of producing an absurd result in a particular case. For instance, the spouse accused of adultery may yet, after the ruling of the court under section 5, go into the witness-box and there give in testimony facts which tend both against that spouse and against the intervener and which,

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⁵ [1936] 1 K.B. 169; 52 T.L.R. 131.

⁶ [1945] P. 15.

⁷ [1953] 1 W.L.R. 1365.

⁸ Ibid. 1369.

⁹ [1936] 1 K.B. 169.

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when added to the previous evidence, may result in a finding on evidence admissible against both that that adultery took place. In such a case one could then come upon the position that the adultery had been proved against the intervener upon the totality of evidence available against him or her, and yet that intervener had been already dismissed from the suit. It was for that reason that I felt it appropriate to ask Mr. Temple whether he was going to call the husband in the present case to testify on the issue as to whether there had been adultery, or whether he was going to take his stand on section 32 (3) of the Matrimonial Causes Act, 1950. Mr. Temple gave an unequivocal answer that he was going to call his client on the point which I have mentioned.

In the circumstances I have come to the conclusion in this case—as in the one which fell for decision at Leeds Assizes—that counsel for the intervener should be put to his election. This, accordingly, I propose to do. In the nature of things a similar result may ensue in the great bulk of causes where applications are made by co-respondents and interveners under the provisions of section 5. That, however, does not alter the position that each such application must be the subject of a discretion to be exercised on the facts of the case as opposed to one which should be exercised according to automatic rule.

Solicitors: *Braund & Fedrick, Woolwich; Benson, Mazure & Co.; Tatton, Gaskell & Tatton.*

NOTE.

LANCE v. LANCE AND GARDINER.

1957
Dec. 5.
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Jan. 15.

Husband and Wife—Practice—Submission of no case—Divorce—Submission of no case by co-respondent—Matrimonial Causes Act, 1950 (14 Geo. 6, c. 25), s. 5.

Mr.
Commissioner
Latey Q.C.

DEFENDED PETITION for divorce.

At the close of the petitioner's case, by which it was alleged that the respondent had committed adultery with the co-respondent, it was submitted by counsel for the co-respondent that there was no case for him to answer, and that he was not obliged, having regard to the wording of section 5 of the Matrimonial Causes Act, 1950, to be put to his election to call no evidence upon such a submission. The commissioner ruled that he would not put counsel to his election, and after

argument on the evidence held that there was no evidence on which the co-respondent could be found guilty of adultery, and accordingly dismissed him from the suit, reserving detailed judgment on the question raised by the submission until the whole case had been concluded.

Harold Brown Q.C. and *D. Armstead Fairweather* for the husband.
Bernard Gillis Q.C. and *Kenneth Jones* for the wife.
Colin Duncan for the co-respondent.

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MR. COMMISSIONER LATEY Q.C. said during the course of his judgment when dealing with the submission of no case to answer: So far as the co-respondent is concerned, I accepted the submission of his counsel, Mr. Colin Duncan, when the petitioner's case was closed, that there was no case of adultery against him to answer. Before taking that course I had to consider whether or not, following the decision in *Alexander v. Rayson*,¹ the court was bound to put counsel for the co-respondent to his election, that is, if he submits no case to answer, that he must stand by his election and call no evidence if his submission were to fail. Mr. Colin Duncan urged that he was not obliged to make such election, on two grounds. The first was that Lord Greene M.R., in *Yuill v. Yuill*,² having stated that the practice was discussed in *Alexander v. Rayson*,³ said: "I will assume that it is a proper practice to follow in the Divorce Division. It does not mean that counsel by submitting no case ipso facto loses his right to call evidence if his submission fails. He only loses that right if he definitely elects to call no evidence. He may make this election expressly or (as in *Laurie v. Raglan Building Co.*⁴) impliedly. The practice which has been laid down amounts to no more than a direction to the judge to put counsel who desires to make a submission of no case to his election, and to refuse to rule unless counsel elects to call no evidence . . . but if . . . no election in fact takes place, counsel is entitled to call his evidence just as if he had never made the submission."

Mr. Colin Duncan declared at the outset, after the petitioner's case was closed, that he refused to elect, and following the direction just cited in *Yuill v. Yuill*⁵ this court might refuse to rule. But he then came to his second ground, that he was invoking section 5 of the Matrimonial Causes Act, 1950; and he proposed to call evidence if his submission that there was no evidence on which the case could proceed against the co-respondent were rejected. This section, originally section 11 of the Matrimonial Causes Act, 1858, later reproduced as section 179 of the Supreme Court of Judicature (Consolidation) Act, 1925, provides: "In any case in which, on the petition of a husband for divorce on the ground of adultery, the alleged adulterer is made co-respondent or in which, on the petition of a wife for divorce on the ground of adultery, the person with whom the husband is alleged to have committed adultery is made a respondent, the court may,

¹ [1936] 1 K.B. 169; 52 T.L.R. 131.

³ [1936] 1 K.B. 169.

⁴ [1942] 1 K.B. 152; [1941] 3

² [1945] P. 15, 18; 61 T.L.R. 176; [1945] 1 All E.R. 183.

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⁵ [1945] P. 15.

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"after the close of the evidence on the part of the petitioner, direct
"the co-respondent or the respondent, as the case may be, to be
"dismissed from the proceedings if the court is of opinion that there
"is not sufficient evidence against him or her."

It is to be observed that Lord Greene M.R., in his explanation in *Yuill v. Yuill*⁶ of the principle laid down in *Alexander v. Rayson*,⁷ said: "I will assume that it is a proper practice to follow in the "Divorce Division." In fact there was no such practice of election in the Divorce Court before the decision in *Alexander v. Rayson*.⁷ I am not quoting Lord Greene M.R. in that, but stating it as a fact. Moreover, the attention of the Court of Appeal in *Yuill v. Yuill*⁸ was not drawn to section 179 of the Judicature Act, 1925, for the all sufficient reason that it does not apply to husband and wife who are opposing parties in a divorce suit. This section is identical with section 5 of the Matrimonial Causes Act, 1950, which has replaced it. It was a procedural section peculiar to the Divorce Court and it has never been repealed; and Mr. Colin Duncan urged that it gave this court a discretion, which must be exercised judicially, to hold that there was no case to answer at the close of the petitioner's evidence, and that this section should be applied, notwithstanding the practice laid down in the civil suit of *Alexander v. Rayson*.⁹

Further, he referred to my own observations in *Beal v. Beal* (*Reade cited*),¹⁰ in which I allowed counsel for the party cited to submit no case, without putting him to his election, rejected his submission, and allowed him to call evidence on the strength of section 5.

Mr. Harold Brown argued that it was incumbent on me under *Alexander v. Rayson*¹¹ to put Mr. Colin Duncan to his election, and drew my attention to a recent decision of Sachs J. in *Gilbert v. Gilbert and Abdon* (*Adams intervening*),¹² in which the same submission of no case to answer was made on behalf of a woman intervener and the judge put her counsel to his election. It is clear that in that suit the judge, having heard all the evidence on behalf of the wife, had some doubts as to there being no case to answer, and that is why he put counsel to his election. Incidentally, the judge pointed out the possible inconvenience of a party being thus dismissed from the suit, and further evidence being adduced by an alleged accomplice in the adultery which would go a long way to proving the guilt of the party discharged, and Mr. Brown emphasized that point in the present case. Of course, it is not an uncommon situation in the Divorce Court, however paradoxical it may appear to the lay mind, that "A" is found guilty of adultery with "B," but "B" is acquitted thereof for lack of proof against "B."

Sachs J. also demurred in *Gilbert v. Gilbert*¹² to my suggestion in *Beal v. Beal* (*Reade cited*)¹³ that section 5 might be obsolete, and said¹⁴: "Nothing in the way of a rule of practice could prevail against "the provisions of that section or take away that discretion from the

⁶ [1945] P. 15, 18.

⁷ [1936] 1 K.B. 169.

⁸ [1945] P. 15.

⁹ [1936] 1 K.B. 169.

¹⁰ [1953] 1 W.L.R. 1365; [1953]

2 All E.R. 1228n.

¹¹ [1936] 1 K.B. 169.

¹² Ante, p. 131; [1957] 3 All E.R. 604.

¹³ [1953] 1 W.L.R. 1365.

¹⁴ Ante, p. 133.

"courts." I cheerfully accept his Lordship's correction, especially as I have held in this case that section 5 is in full force in the Divorce Court.

This decision on the point of procedure having been made, Mr. Colin Duncan submitted on the pleadings and on the evidence that no case at all of adultery had been made out against the co-respondent. He said that there was not a scintilla of evidence of inclination and next to nothing of association, except that of a riding master and the wife as a voluntary assistant in looking after the horses.

Despite Mr. Brown's argument to the contrary, that was already the conclusion which had been forming in my mind before any submission was made. I therefore exercised my discretion under section 5, which I could have done without any application by counsel, and I dismissed the co-respondent from the suit.

There has been nothing in the subsequent evidence, to which I shall refer later, called on behalf of the respondent, to throw any doubt on that decision, which incidentally saved considerable costs of further representation of the co-respondent during the continuance of the trial, and also saved the co-respondent from anxiety with regard to his own position during the long adjournment that became necessary.

Solicitors: *Smiles & Co.; D. Herbert, Banbury; Stoneham & Sons.*

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Probate—Administration—Administration cum testamento annexo—Application for grant by persons claiming as beneficiaries under ambiguous will—Power of Probate judge to construe will—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 162.

Will—Construction—Absolute or life interest—Gift over of "anything that is left" at donee's death.

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A testatrix sought to dispose of her estate by a will in the following terms: "I give and bequeath unto my brother . . . All "property and everything I have money and otherwise. At his "death anything that is left, that came from me to go to my late "husband's grandchildren . . ." The brother duly proved the will and died intestate leaving no persons interested on his intestacy. The husband's grandchildren then applied for a grant of letters of administration cum testamento annexo de bonis non administratis claiming that, upon the true construction of the will, they were entitled in equal shares to the estate of the testatrix. The application was opposed by the Treasury Solicitor, who contended that the gift to the brother was absolute and that the estate should go to the Crown as bona vacantia:—

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Held, (1) that where a grant is sought, the making of which depends upon the construction of a will, the Probate Court is not bound to deal with the point of construction and, according to the modern practice, will lean heavily against so doing. But it may make a grant to such person as it thinks expedient under section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, and leave the matter of construction to be referred to the Chancery Division.

Annual Practice, 1957, p. 3338, to the effect that the Probate Court must determine the matter and construe the will disapproved.

The possible depletion of the assets of a small estate is a consideration which may induce the judge of the Probate Court to deal with the question of construction and make a grant, and such a course was appropriate in the present case.

(2) That upon the true construction reached by reading the will as a whole and then seeking that construction which would most effectively express the intentions of the testatrix, the words used were sufficiently clear to cut down the brother's interest from an absolute to a life interest and the applicants were entitled to the estate in equal shares and hence to the grant as sought.

Constable v. Bull (1849) 3 De G. & Sm. 411 and *In re Sanford* [1901] 1 Ch. 939 followed.

In re Gouk, decd. [1957] 1 W.L.R. 493; [1957] 1 All E.R. 469 distinguished.

PROBATE MOTION.

The testatrix, Bertha Mary Last, died in April, 1953, having duly executed a will on December 2, 1940, which was written out by the testatrix herself on a printed will form. It did not appear that in the preparation of this will she had the benefit of any skilled advice.

The will revoked all earlier wills and appointed her brother, Tom Goodman Cotton, as her executor. The testatrix then sought to dispose of her estate in the following terms: "I give and bequeath unto my brother Tom Goodman Cotton. All property and everything I have money and otherwise. At his death anything that is left, that came from me to go to my late husband's grandchildren Claude Frederick George Baker Harold George Last." The will was duly proved by Tom Goodman Cotton on June 17, 1953. On April 22, 1957, he died intestate and without issue or relations entitled to share in his estate in the event of an intestacy, nor had he appointed trustees of the trusts (if any) created by the will.

The applicants in the motion, by which a grant of letters of administration with the will of December, 1940, annexed de bonis non administratis to the estate of the testatrix was sought, were the late husband's grandchildren as named in the will. They

claimed that, upon the true construction of the will and in the events which had happened, they were entitled in equal shares to the estate of the testatrix and contended that, upon the correct construction of the will, Tom Goodman Cotton took a life interest only in the estate, and that after his death the applicants became absolutely entitled thereto. The opposite view was canvassed by the Treasury Solicitor, who contended that Tom Goodman Cotton took the whole of the estate of the testatrix absolutely, and that, in the events which had happened, the estate should go to the Crown as *bona vacantia*.

Upon the case for the applicants being opened, Karminski J. expressed doubt whether he ought to determine a matter which was in substance one of construction, the Chancery Division being the appropriate Division for that purpose.

J. W. Bygott-Webb for the applicants. I am seeking a grant of letters of administration to the applicants as those interested in the estate. In order that a grant may be made it is, therefore, essential to ascertain the true construction of the will, and in these circumstances the Court of Probate must determine the meaning and should decide all questions in controversy when it has the material before it: see the Annual Practice, 1957, p. 3338, *In the Estate of Lupton*,¹ in which the Probate Court did determine the question of construction in circumstances very similar to those of the present application, and *In the Estate of Frogley*.² The application is for a grant to the applicants and it is impossible to argue the matter on their behalf without raising the question of construction. The resources of this small estate will be considerably diminished if the applicants have to recommence the matter elsewhere.

Victor Russell (R. F. Hannay with him) for the Treasury Solicitor. It is not sought to submit that this court should not entertain the present matter. In view of the nature of the estate the submissions of counsel for the applicants are supported.

KARMINSKI J. This court is not bound by the Annual Practice, and *In the Estate of Lupton*³ was decided some 50 years ago. During recent times this court has strongly leant against dealing with questions of construction: see *In the Estate of Heys*, per Sir Samuel Evans P.,⁴ and *In the Estate of Fawcett*,⁵ per

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¹ [1905] P. 321.² [1905] P. 137; 21 T.L.R. 341.³ [1905] P. 321.⁴ [1914] P. 192, 200; 30 T.L.R. 637.⁵ [1941] P. 85; 57 T.L.R. 541; [1941] 2 All E.R. 341.

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Langton J. I, at one stage, took the view that the proper course would be to make a grant to some suitable person or body in pursuance of the powers vested in the court under section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended, leaving the applicants to obtain a decision on a construction summons in the Chancery Division before determining the question of a grant issuing to them.

After hearing a plea ad misericordiam by both counsel, however, although the modern view as to the function of the Probate Court is that the court should interfere in questions of construction as little as possible, I have come to the conclusion that it would be proper to determine the question of the construction of the will as a matter of convenience in order to avoid any further depletion of the assets of a small estate if reference to the Chancery Division had to be made.

The question of the true construction of the will was then argued.

J. W. Bygott-Webb for the applicants. The question is whether Tom Goodman Cotton took a life interest in the estate of the testatrix or an absolute interest to the exclusion of the applicants. A will must be construed ut res magis valeat quam pereat so as to give effect as far as possible to all the words used, for it is to be assumed that additional words are not used without some purpose. If the general intention of the testator can be collected from the whole will, particular terms used which are inconsistent with that intention may be rejected as introduced by the mistake of the testator or ignorance of the force of the words used. Where the latter part of a will is inconsistent with the first part, the latter part will prevail: *Sherratt v. Bentley*.⁶ When construing a will regard must be had to the intention of the testator in so far as such intention is ascertainable from the words actually used. It is clear that the testatrix here intended the applicants to get something. Although the grandchildren of the testatrix's late husband, they were the only children near to her and she would have clearly wished to benefit them. It is even clearer that it was no part of her intention that the Crown should benefit by taking the estate as bona vacantia.

The words used in the will in *Constable v. Bull*⁷ were almost identical with those of the present case and, although every will

⁶ (1834) 2 My. & K. 149.

⁷ (1849) 2 De G. & Sm. 411.

must be considered on the actual words used in it, where words to be construed are indistinguishable from those used in a previously decided case that authority should be followed. [*In re Sheldon and Kemble*,⁸ *In the Estate of Lupton*,⁹ *Bibbens v. Potter*¹⁰ and *In re Thomson's Estate*¹¹ were referred to as supporting the construction contended for by counsel for the applicants.]

It is conceded that the words "anything that is left" are the stumbling block, if any, in this application, but Theobald on Wills, 11th ed., p. 434, referring to a gift of "whatever remains"—which phrase, it is submitted, is indistinguishable from the present words—points out that those words of themselves are not sufficient to make a life interest into an absolute interest. The question is, what was the intention of the testatrix? and, if that intention was to give a life interest, the use of such words will not prevent that intention from coming into effect.

Finally, the court will, in construing a will, endeavour to find a construction which will harmonize irreconcilable provisions and incline against a construction which would be unjust, absurd or inconvenient.

Victor Russell (*R. F. Hannay* with him) for the Treasury Solicitor. The gift in the will was an absolute gift and the second part of the dispositive sentence is repugnant to it and must be disregarded. A number of authorities support this proposition, an early and important one being *Watkins v. Williams*,¹² in which Lord Truro L.C. discussed the rule that if property is given absolutely it cannot by subsequent words be subject to a proviso. The paragraph commencing with the words¹³ "Now it is a rule . . ." is relied upon. [*Henderson v. Cross*¹⁴ and *Perry v. Merritt*¹⁵ were referred to.] In *In re Jones*¹⁶ Byrne J. held that an absolute interest could only be cut down by words which were sufficiently clear and strong. He said¹⁷: ". . . the law requires that if there is an absolute gift in the first instance you must have clear words to cut down that estate." Those words are strongly relied upon. [*Bowes v. Goslett*¹⁸ and *In re Dunstan*¹⁹ were also referred to.] In *In re Gouk, decd.*²⁰ a testatrix gave the remainder of her estate to her sister and "thereafter" to her sister's issue, and Danckwerts J. held that

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⁸ (1885) 53 L.T. 527.

⁹ [1905] P. 321.

¹⁰ (1879) 10 Ch.D. 733.

¹¹ (1879) 13 Ch.D. 144.

¹² (1851) 3 Mac. & G. 622.

¹³ Ibid. 629.

¹⁴ (1861) 29 Beav. 216.

¹⁵ (1874) L.R. 18 Eq. 152.

¹⁶ [1898] 1 Ch. 438.

¹⁷ Ibid. 441.

¹⁸ (1857) 27 L.J.Ch. 249.

¹⁹ [1918] 2 Ch. 304.

²⁰ [1957] 1 W.L.R. 493; [1957] 1 All E.R. 469.

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the sister took absolutely; it is submitted that that case is analogous to the present.

Constable v. Bull,²¹ the case on which counsel for the applicants chiefly relies, was not fully reported. The court did not have the rule in *Watkins v. Williams*²² before it or many of the line of cases relied upon on behalf of the Crown. It is submitted that *Constable v. Bull*²³ is to be distinguished on the facts from the present case in so far as on the terms of the will in that case there were two successive gifts. Again, in *In re Sheldon and Kemble*²⁴ the court does not appear to have been referred to the cases relied upon in the present argument. In *In the Estate of Lupton*²⁵ the words used were stronger than in the present case; they amounted not merely to a pious hope but to a definite direction; *Watkins v. Williams*²⁶ was not cited. *Bibbens v. Potter*²⁷ was a case in which an absolute gift was cut down by a codicil, thus rendering the circumstances much stronger than in the present case, since the execution of a codicil presupposes a definite intention to alter a will.

It is finally submitted that in the present case the testatrix intended to leave everything to her brother and then expressed a pious hope that anything that was left might go to the present applicants. If an absolute gift is to be cut down, the words used must be completely clear.

Bygott-Webb in reply. *In re Gouk, decd.*²⁸ was decided on a completely different line of cases from that which, it is submitted, applies to the present facts and is distinguishable because there was no mention of the death of the first donee. *Watkins v. Williams*²⁹ was also a completely different case. There there was a life interest upon which it was held by Lord Truro L.C. no condition could be imposed. Wills must be construed from the words themselves and not from other wills which are somewhat similar. If the court comes to the conclusion in the present case that an absolute interest was intended, then that is the end of the matter, but the proposition contended for, and which is supported by the authorities cited, is that what at first appears to be an absolute interest may have been cut down by the testatrix's subsequent words to a life interest. *Henderson v. Cross*³⁰ and *In re Jones*³¹ are to be distinguished. The former

²¹ 3 De G. & Sm. 411.

²² 3 Mac. & G. 622.

²³ 3 De G. & Sm. 411.

²⁴ 53 L.T. 527.

²⁵ [1905] P. 321.

²⁶ 3 Mac. & G. 622.

²⁷ 10 Ch.D. 733.

²⁸ [1957] 1 W.L.R. 493.

²⁹ 3 Mac. & G. 622.

³⁰ 29 Beav. 216.

³¹ [1898] 1 Ch. 438.

gave only a power to spend and the latter was a very different case indeed with much stronger words suggesting an absolute interest to the first donee.

*Constable v. Bull*³² has never been disapproved and should be followed. The words used, although not quite the same, are to the same effect and, indeed, in that case were stronger in favour of an absolute interest. [*In re Sanford*³³ was referred to.] The cases cited for the Treasury Solicitor can also be distinguished, since in those cases there was always somebody entitled to benefit from the estate. It cannot have been in the mind of this testatrix that the Crown should benefit at the cost of the applicants, and that construction should be favoured which leads to substantial justice and not to absurdity.

Cur. adv. vult.

KARMINSKI J. referred to the facts, remarking that they had resulted in a question of construction which had caused him some difficulty, and continued: The testatrix has, in consecutive sentences, made what appears to be an absolute gift of all her estate to her brother, but then added words which indicate a gift over on his death to the present applicants. With the aid of a number of authorities (some of which are themselves difficult to reconcile) I have to try to ascertain first the true principles of construction, and then to apply them in order to ascertain what were the testamentary intentions of this unskilled testatrix.

In his clear and careful argument, Mr. Bygott-Webb submitted that effect must be given to the whole of the words used by the testatrix, and that the additional words bringing in the applicants cannot be without purpose and must indeed prevail over the earlier words purporting to make an absolute gift to T. G. Cotton. It was further submitted by Mr. Bygott-Webb that the testatrix was very unlikely to have wished to benefit the Crown by the will, and that, therefore, the court should lean against a construction which would produce a result wholly inconsistent with the testatrix's wishes. It may well be that the testatrix did not intend the Crown to be the object of her testamentary bounty. It may be even more likely that such a possibility never even entered her mind. But if the true construction of this will warrants the conclusion that it gave the whole estate to T. G. Cotton absolutely, I cannot avoid such a

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³² 3 De G. & Sm. 411.

³³ [1901] 1 Ch. 939.

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conclusion only because it may produce a result which the testatrix did not clearly foresee and may not at all have desired.

Mr. Victor Russell, for the Treasury Solicitor, argued that the gift to T. G. Cotton was absolute, and that the second part of the will was repugnant to the first. Mr. Russell further argued that to reduce T. G. Cotton's absolute interest, very clear words must be used: that there were no such clear words used here, and that the introduction of the applicants into the will was no more than a pious hope expressed by the testatrix to T. G. Cotton.

It will be observed that the testatrix has used these words in her will: "At his death anything that is left, that came from "me to go to my late husband's grandchildren." I find the difficulty stems from the use of the words "anything that is left." But for the introduction of these words I should have felt little difficulty in deciding that the testatrix intended to give a life interest only to T. G. Cotton. But the introduction of these words does not prevent the cutting down of an absolute interest to a life interest if the will itself supports such a construction (see Theobald on Wills, 11th ed., p. 434).

In *Constable v. Bull*¹ the words used were "whatever "remains of my said estate and effects." It was there held by Knight-Bruce V.-C.² that these words prevented the widow from disposing of the property and that the other legatees mentioned in the will had a substantial interest. I do not think that there is any real difference in meaning between the words "whatever remains" and "anything that is left." In *In re Sheldon and Kemble*³ a testator bequeathed, in substance, all his real and personal estate to his wife, but added the desire that, at her death, what might remain of his property should be equally divided among his surviving children. Kay J. refused to treat the gift over to the children as void, saying⁴ that the case could not be distinguished from *Constable v. Bull*,⁵ and he also said⁶: "If there is any sort of ambiguity, the court ought to adopt that "construction, which most effectively regards the testator's "intention, reading the whole will together."

In *In re Thomson's Estate*⁷ a testator left all his property real and personal to his wife to be disposed of as she might think proper and, in the event of her decease should there be anything remaining of the said property or any part thereof, to

¹ (1849) 3 De G. & Sm. 411.

² Ibid. 413.

³ (1885) 53 L.T. 527.

⁴ Ibid. 528.

⁵ 3 De G. & Sm. 411.

⁶ 53 L.T. 527, 528.

⁷ (1879) 13 Ch.D. 144.

certain named persons. Hall V.-C. held that the widow took only an estate for life with a power of disposition only during her life, and not a power to dispose by will and that, therefore, what the widow had not actually disposed of in her lifetime was subject to the gift over.

I have so far discussed only some of the cases which have resulted in the defeat of an absolute interest, and in the establishment of a gift over. Both Mr. Bygott-Webb and Mr. Russell referred me to a number of decisions in the contrary sense. Thus, in *Henderson v. Cross*,⁸ a testatrix left all her property to her father, but added these words: "Should my dear father not spend the property which I leave in trust for him, it to be equally divided between my two sisters." Sir John Romilly M.R. held this to be an absolute gift to the father, on the principle that the gift over did not cut down the previous interest but left it in the same state as it was before. See also *Perry v. Merritt*,⁹ where, after a bequest of residue to a wife for her absolute use and benefit, a will directed that all the money (if any) that should be remaining at her death be divided between a daughter and her three children. Hall V.-C. held that the widow took an absolute interest in the residuary personal estate.

Perhaps the strongest authority in favour of the Treasury Solicitor's contention is *In re Jones*.¹⁰ There a testator gave all his property to his wife "for her absolute use and benefit, so that during her lifetime . . . she shall have the fullest power to sell and dispose of my said estate absolutely. After her death, as to such parts . . . as she shall not have sold or disposed of . . . I give devise and bequeath unto my brother . . . and to my wife's sister . . . upon trust to . . . divide . . ." among certain persons. Byrne J. held that the widow took an absolute interest in the testator's real and personal estate. Discussing the rules of construction in cases of this kind, he said¹¹: "It is clear that if a gift is made in terms to a person absolutely, that can only be reduced to a more limited interest by clear words cutting down the first estate. There is a principle also . . . that although the words are absolute in the first instance, you may find subsequently occurring words sufficiently strong to cut down the first apparent absolute interest to a life interest."

*In re Jones*¹² was distinguished by Joyce J. on the facts in *In re Sanford*.¹³ In the latter case a will and codicil had to be

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⁸ (1861) 29 Beav. 216.

⁹ (1874) L.R. 18 Eq. 152.

¹⁰ [1898] 1 Ch. 438.

¹¹ *Ibid.* 441.

¹² *Ibid.* 438.

¹³ [1901] 1 Ch. 939.

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construed together, and the facts there were wholly different from the present case. But in the course of his judgment Joyce J. used the following words which are of general application¹⁴: "The adoption of the construction which I prefer has the not unimportant merit of effectuating the obvious and expressed intention of the testator, and if the terms of the codicil be ambiguous . . . there is not wanting authority to shew that in a case of obscurity or ambiguity . . . weight may be given to the consideration that it is better to effectuate than to frustrate the testator's intention."

Lastly, I would refer briefly to the recent decision of *In re Gouk, decd.*¹⁵ There a testatrix gave all the remainder of her estate to her sister and, thereafter, to her sister's issue. Danckwerts J. had to consider the meaning of the words "and there- after," which he held to be indistinguishable from the word "afterwards." He held that the sister took absolutely, since there was no express reference to her death. I must distinguish that case from the present, where the words used by the testatrix were "at his death."

[In a matter of construction of this kind it is clearly essential to pay particular attention to the terms of the instrument which is being construed and to avoid too close comparisons with words used in wills in other cases. In this case, looking at the will as a whole, I have come to the conclusion that the words used are sufficiently clear to cut down T. G. Cotton's interest from an absolute to a life interest. Clearly there is an ambiguity, but I have attempted to read the will as a whole, and then to reach that construction which most effectively, in my view, expresses the intentions of the testatrix.] I remind myself of the words of Joyce J. in *In re Sanford*¹⁶: "Weight may be given to the consideration that it is better to effectuate than to frustrate the testator's intentions."

In the result, I find that upon the true construction of this will, the applicants are entitled in equal shares to the estate of the testatrix and to a grant of letters of administration with the will of December 2, 1940, annexed de bonis non administratis of the estate of the testatrix.

Order accordingly.

Solicitors: *Tapp, Blackmore & Weston for Cousins, Burbidge & Connor, Portsmouth; The Treasury Solicitor.*

E. J.

¹⁴ [1901] 1 Ch. 939, 943-944.

¹⁶ [1901] 1 Ch. 939, 944.

¹⁵ [1957] 1 W.L.R. 493; [1957]

1 All E.R. 469.

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lex loci celebrationis—Rebuttal of.*

Sachs J.

The circumstances in which the presumption of subjection to local law, which is the basis of the rule that the validity of a foreign marriage is governed by the *lex loci celebrationis*, can be rebutted are not restricted to previously decided categories, but depend upon the particular facts of each case.

Taczanowska (orse. Roth) v. Taczanowski [1957] P. 301; [1957] 2 All E.R. 563 considered.

The parties, who were born in Warsaw and domiciled in Poland until 1939, were married in Germany in June, 1945. The ceremony of marriage, which was conducted according to the rites of the Roman Catholic Church by a Polish Roman Catholic priest, neither purported to nor did conform to German law. At the date of the marriage the parties were living in a displaced persons camp in Germany, the occupants of which did not fraternize with the Germans and led the lives of a separate community. The husband came to England, where he acquired a domicile of choice, and in December, 1956, he filed a petition asking for the dissolution of the marriage on the ground of the wife's desertion:—

Held, that, in the particular circumstances, the presumption that the parties had subjected themselves to German law for the purpose of celebrating their marriage was rebutted and, since the ceremony was one which would constitute an English common law marriage, the marriage was valid and, the wife being guilty of desertion, should be dissolved.

UNDEFENDED PETITION.

The parties went through a ceremony of marriage at the Roman Catholic Parish Church of Nordheim in Germany on June 10, 1945. Both parties had been born in Warsaw and had been domiciled in Poland at the beginning of the war in 1939. The ceremony was conducted according to the rites of the Roman Catholic Church by a Polish Roman Catholic priest who was acting as chaplain to a camp in Nordheim in which there were then some five thousand Poles. The marriage neither purported to nor did conform to German law.

The husband, in 1939, was an officer in the Polish Army; he was captured and disarmed by the German Forces; then he escaped and joined the Polish Home Underground Army. Still later he took part in the Warsaw insurrection, was twice wounded, was decorated for valour, and was captured a second time by the Germans. He was treated as a prisoner of war and thus came to be confined in a prisoner of war camp at Zeidheim

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near Nuremberg. There he met the wife, who was then nursing as a sister of charity in the prison hospital.

On April 28, 1945, all those in Zeidheim Camp were liberated by the Russian Army. On May 15, 1945, the parties, with some others, crossed into the British Zone and they proceeded to a displaced persons camp at Nordheim which came to contain the five thousand Poles referred to. There these Poles lived the life of a separate community. Within the camp the orders were, in effect, "Do not fraternize with Germans; have nothing to do with them." The community adopted a military or paramilitary form of organization; there was a colonel commandant in charge at the head of the camp and he, in due course, formed all those in the camp into four "battalions." The husband, who had been a lieutenant in the Polish Army, acted as commander of one of those four units. The colonel then placed himself and the units under the direction of the British Occupying Forces. But the facts in evidence did not warrant a finding that, at any material time, those in the camp became part of the Occupying Forces, nor was it submitted that such a conclusion could result from those facts. Nothing in the evidence suggested that the colonel who assumed charge of the camp had any superior officer from whom he took orders, as in the case of the ordinary military chain of command, nor was there any evidence that he was prepared to accept military orders from any Government that either had the de facto or de jure sway over Poland.

The Roman Catholics of this separate community used the Parish Church of Nordheim as their church, a Polish priest officiating in his capacity of chaplain to the camp. Contemporaneously the same church was used by the German Roman Catholics resident in the locality, a German Roman Catholic priest officiating on those occasions. In that church marriages between the Polish members of the camp were celebrated, and similarly in the same church marriages between Germans were celebrated.

There was evidence of a breakdown at that period of some of the German administrative services, such as that of the police and of the post office; there was no evidence that in that particular locality marriages according to German law were impossible or even difficult to celebrate; indeed, the inference to be drawn from the evidence was that the husband and wife could have married in conformity to German law had they so elected.

The reason why they chose to celebrate the marriage in the manner in which they did was doubtless partly because they were members of a community whose life was based on having nothing to do with the Germans, and partly because the leaders of that community would have advised that such a celebration was valid according to Polish law. It was established in evidence that by the Polish law in force on June 10, 1945, a marriage outside Poland of Poles born in Warsaw was valid in either of two events: first, if celebrated according to *lex loci celebrationis*, or secondly, if celebrated by a religious ceremony such as that which obtained in the present case. The latter alternative covered any marriage by the camp chaplain at the Nordheim church, and in the chaplain's office was kept an appropriate register of marriages, in which the present marriage was entered.

Shortly after the marriage the wife left the husband and never returned to him. In 1953 the husband became domiciled in England, and in December, 1956, he filed a petition for divorce on the ground of desertion.

A. *St. John Davies* (G. L. S. *Dobry* with him) for the husband. The ceremony of marriage in this case did not conform to the requirements of German law but it was valid according to the law of Poland, which was the *lex domicilii* of both parties at that time. It is a well-established principle that the validity of a marriage is governed, as to formalities, by the *lex loci celebrationis* (*Berthiaume v. Dastous* ¹) and that parties who contract a marriage in a foreign country are deemed to have subjected themselves to the law thereof: *Scrimshire v. Scrimshire*.² There are, nevertheless, exceptional circumstances in which these principles do not apply, for example, marriages which take place according to the provisions of the Foreign Marriage Acts, 1892 to 1947. A line of cases has also established a further exception in circumstances where there is some insuperable difficulty to contracting a marriage according to the formalities of the *lex loci celebrationis*: see *Savenis v. Savenis* ³ and *Ruding v. Smith*.⁴ [*Wolfenden v. Wolfenden* ⁵ was also referred to.] *Pilinski v. Pilinska*,⁶ in which the marriage was invalid according to the *lex loci*, held that that law could not be displaced, because there was,

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¹ [1930] A.C. 79; 45 T.L.R. 607.

² (1752) 2 Hag.Con. 395.

³ [1950] S.A.S.R. 309.

⁴ (1821) 2 Hag.Con. 371.

⁵ [1946] P. 61; 62 T.L.R. 10;

[1945] 2 All E.R. 539.

⁶ [1955] 1 W.L.R. 329; [1955] 1 All E.R. 631.

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in fact, no obstacle to the performance of a ceremony valid by that law.

*Taczanowska (orse. Roth) v. Taczanowski*⁷ is of great importance in establishing that the impossibility of celebrating a marriage according to the *lex loci* is not the only ground, together with those set out in Dicey, 6th ed., pp. 758-759, rule 168, upon which the operation of that law could be displaced. In that case the marriage between Polish nationals was performed in Italy in 1946 by a Polish army chaplain, the husband being a member of the Polish forces; it was invalid according to the law of that country. It was held that the rule in *Scrimshire v. Scrimshire*⁸ did not apply to a contract performed in an occupied country by members of the occupation forces and that, in the absence of evidence that the Allied Forces were in any way subject to the law of that country, there was no reason why the marriage should be governed by the law of Italy. It was held, moreover, that in those circumstances, notwithstanding the foreign nationality and domicile of the parties, the validity of the marriage was to be tested in the English courts according to English common law. That decision precludes the submission that the present marriage should be held valid on the ground that it would be so recognized by the Polish courts.

The facts of the present case are to be distinguished from those in *Taczanowska (orse. Roth) v. Taczanowski*,⁹ since neither the parties nor the priest were members of the occupation forces. Nevertheless, *Taczanowska (orse. Roth) v. Taczanowski*⁹ is relied on as showing that the *lex loci* can be excluded wherever the particular facts of the case are such as to indicate that there was no intention of the parties to submit themselves to that law. The parties in the present case were clearly minded to reject any connexion with Germany or with German law, and according to the decision in *Taczanowska (orse. Roth) v. Taczanowski*⁹ the English common law applies. The marriage was a valid marriage according to that law and, if the court is satisfied as to the wife's desertion, a decree nisi should be granted.

Cur. adv. vult.

June 28. SACHS J. referred to the facts, stating that the first issue to be decided was whether, in the circumstances, the ceremony resulted in a marriage which could be held to be

⁷ [1957] P. 301; [1957] 2 All E.R. 563.

⁸ 2 Hag.Con. 395.

⁹ [1957] P. 301.

valid by the English courts, and remarking that not every body of persons who placed itself under the direction of an occupying force thereby necessarily became a member of that force, and continued: The marriage between these two Poles at Nordheim is one which would clearly be held to be valid by a Polish court under the law which anyone in the above community would have expected to apply and which I hold they elected to apply. Mr. Davies, to whose assistance I am much indebted, was, however, constrained to concede, for reasons to which I will later refer, that he could not safely submit that this court could, for that reason, hold the marriage to be valid. He relied on the contention that there had been a valid common law marriage between the parties.

In their recent and highly important decision of *Taczanowska (orse. Roth) v. Taczanowski*¹ the Court of Appeal fully considered the authorities relating both to the origin of the rule under which the validity of a foreign marriage as regards formalities is generally governed by the *lex loci celebrationis*, and also to the principles upon which the courts of this country will exceptionally recognize a common law marriage celebrated in a foreign country. Thus it is not necessary for me to look further than that decision to ascertain what, in the present case, are the principles to be applied when considering the above submission of Mr. Davies. These clearly emerge as follows: First, the validity of a foreign marriage as regards formalities is, as a general rule, governed by the law of the country in which it is celebrated. Secondly, the basis of that general rule is a presumption that the parties to the marriage have subjected themselves to the law of that country. Thirdly, the above presumption is rebuttable: the onus of establishing an exception to the general rule being on whoever asserts that exception. Fourthly, once it is shown that the parties did not subject themselves to the law of the country in question, then it is open to the court to apply the common law of this country. Finally, a common law marriage knows of no distinction of race or nationality.

Hitherto the decisions of the courts as to the circumstances in which an exception to the above general rule has been established appear, broadly speaking, to have been confined to two categories of circumstances. The first, of which *Taczanowska (orse. Roth) v. Taczanowski*² is itself an example, relates to members of armies operating in the field and of occupying forces. The second relates to persons who are, in effect, so marooned that

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¹ [1957] P. 301; [1957] 2 All E.R. 563. ² [1957] P. 301.

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there is no set of formalities in the relevant area with which they can reasonably comply. This category covers, for instance, areas in which no such set of formalities has ever existed, areas where chaos has so supervened that conformity is a matter of insuperable difficulty (*Savenis v. Savenis*³), and areas where conformity would go contrary to the conscience.

The present case, however, is not one in which it can be said, as in *Taczanowska (or se. Roth) v. Taczanowski*,⁴ that one of the parties to the marriage was a member of an occupying force: indeed, it cannot be safely said, despite the nature of the form of organization adopted in the displaced persons camp, that they were members of any force. Nor is the present case one in which, as in *Savenis v. Savenis*,⁵ any insuperable difficulties existed precluding the celebration of a marriage conforming to the laws of Germany. So the present marriage does not seem to fall into either of the above categories.

Once, however, it is appreciated that, in the case of such a marriage, an issue of fact can arise as to whether, in the particular circumstances, the presumption of subjection to local law has been rebutted, it ceases to matter whether the set of circumstances before the court does not happen to fall into a particular category that has already been the subject of a decision. Naturally a court will proceed with considerable caution before making further inroads on a general rule that has the advantage of certainty and which further "is agreeable to the law of nations which is the "law applicable to every country and taken notice of as such": compare *Scrimshire v. Scrimshire*⁶—a caution that seems especially necessary when one considers the almost infinitely variable sets of circumstances that may arise in modern conditions where there are to be found resistance movements, concentration camps, prisoners of war, camps of displaced persons, and groups of persons who may by divers methods be prevented from leaving the country in which they are living. But that caution may in a specific case mean no more than that the exception to the general rule must be clearly established by evidence. Suffice it, accordingly, to say that in the present case I am simply concerned with an organized community that found itself in an unusual position, and to add that nothing in this judgment is intended to decide whether or in what circumstances an individual who does not fall within one of the above two categories and who is acting in isolation can assert that he has not subjected himself

³ [1950] S.A.S.R. 309.

⁴ [1957] P. 301.

⁵ [1950] S.A.S.R. 309.

⁶ (1752) 2 Hag.Con. 395, 408.

to the law of the locality in which he goes through a form of marriage.

The community in the present case consisted of Poles who had just been liberated from prisoner of war or similar camps and had thus escaped from a much hated form of subjection. The whole basis of their life in the displaced persons camp—no matter whether technically military or civilian—was one of having nothing to do with those who had now ceased to hold them in that subjection.

Any presumption that the recently liberated members of this community had, at the material time, subjected themselves to the laws of a country which they then hated fervently and at whose violent hands they had suffered severely is, to my mind, clearly rebutted. Indeed, to hold that they had, at that time, so subjected themselves would be an odd conclusion.

The presumption of subjection to German law having been rebutted, it is open to this court to apply the common law, and as the celebration, by a Roman Catholic priest in a Roman Catholic church, was of the same type as that which was the subject of the decision in *Taczanowska (orse. Roth) v. Taczanowski*,⁷ it follows that the marriage was valid at common law.

As, however, the marriage was one which was valid by the law of the only courts which the parties would have had in mind at the time of the celebration and which they, so far as they could, elected to apply, namely, those of Poland, and as the common law of England could hardly have been foreseen by either party as providing, in future, the test of validity of that marriage, it is necessary to state the reason why the latter law has been applied when the former might appear to provide a simple and attractive answer after the *lex loci* has been proved not to govern the case.

Up to the time of the decision in the *Taczanowska* case⁷ it was commonly considered by those concerned with such matters in these courts, that where there was a foreign marriage in country A between two persons domiciled in country B, if the local law of A proved inapplicable then the court first turned to the law of country B to test the formal validity of the marriage. An example of this view is to be found in Dicey, 6th ed. (1949), p. 772, where it is stated: "It may, however, be assumed that, "when compliance with the local form is impossible, our courts "will hold the marriages of foreigners valid, at any rate if held

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⁷ [1957] P. 301.

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"good by the law of the country where the foreigners are domiciled"; and it is to be noted that the same statement appeared in the same words in the first edition in 1896. Again, Westlake on Private International Law (1925), 7th ed., p. 63, states: "Where a marriage valid according to the *lex loci* is impossible . . . parties may marry with the forms so far as it is possible to observe them, and with the consents respectively required by their own law." The latest example of this view appeared in the reasoning of Karminski J. in the *Taczanowska* case⁸ when it was decided at first instance.

Further, it is to be noted that before, in relation to foreign marriages, the presumption of subjection to (or election of) the *lex loci* became so firm a feature of the law of this country, the question of which law applied was, according to a then much respected authority, considered to depend on a factual election by the parties to the marriage, and that election was considered to lie simply between the *lex loci* and the *lex domicilii* (see Phillimore's Commentaries on International Law, 3rd ed. (1889), vol. 3, p. 324).

On the appeal in the *Taczanowska* case⁹ the court, dealing with a marriage in which the law of country B was adverse to its validity, held that the courts of this country could, when the application of local law had been eliminated, apply the common law of this country to the benefit of the parties concerned. When coming to that decision it was presumably open to the court, for the matter was *res integra*, after the elimination of the *lex loci* to rule in principle either that the courts of this country must in all circumstances look only to the English common law as regards the formal validity of a foreign marriage or, alternatively, that the courts here could, if the law of country B favoured the validity of the marriage, give the parties the benefit either of the common law or of the law of their own domicile, i.e., country B. The second alternative would have the advantage of assisting comity of decisions as between courts of various countries, and would be consistent with an assumption that a foreign court would, in parallel circumstances, uphold the validity of a British common law marriage between persons domiciled in this country, even though that marriage was invalid according to the formality laws of the country of that foreign court.

⁸ [1957] P. 301, 304; [1956] 3 All E.R. 457.

⁹ [1957] P. 301.

In the *Taczanowska* case¹⁰ Hodson L.J. stated that when once local law has been eliminated, "If it be said that since "the parties are not British subjects, the common law of "England does not apply to them, my answer is that such is "the law *prima facie* to be administered in the courts of this "country." He then goes on to refer to obstacles which might arise in some instances to applying the *lex domicilii* of the persons concerned. In using the words "*prima facie*" he appears to leave the door open to the second of the above alternatives.

Parker L.J., on the other hand, in stating¹¹ " . . . nor do "I see any reason why we should look to the law of the domicile "of the spouses at the time of the marriage. No doubt English "law will look at the law of domicile to determine capacity, but "for no other purpose. Indeed, if English law were to look "to the law of the domicile, what would be the position where "the two spouses had different domiciles? In my judgment "there is no authority or reason which requires us to look to any "other law, once the *lex loci* is inapplicable " may appear to go near to closing the door to that second alternative: but that passage, too, may be read subject to it being addressed to the argument, unsuccessful in the Court of Appeal on the particular facts, that the courts of this country were required to look solely to the *lex domicilii* when once the *lex loci* was eliminated and thus could in no circumstances apply the *lex fori*, i.e., the common law. Ormerod L.J. does not deal specifically with the point.

It was because of the above cited passages that Mr. Davies felt constrained not to press the point that this marriage between two Poles should here be held valid on the ground that the courts of Poland would so recognize it. It is for that reason that once German law was shown not to be applicable, I have decided the issue of validity on a common law basis and it has seemed proper not to consider to the point of decision what is the effect of this marriage being valid by Polish law. The result would, of course, in this case be the same if the court is permitted to apply that law, for as regards the present marriage the laws of both countries are in accord. Indeed, such is the width of the rule as to what may constitute a common law marriage that it may well be found to cover a high proportion of celebrations valid by foreign law, other than proxy marriages, certain marriages of repute, and the like.

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¹⁰ [1957] P. 301, 326.¹¹ *Ibid.* 331.

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Turning now to the petition in the present case, once it has been established that the marriage between the two parties to this cause was a valid one, it only remains to consider whether the husband has proved desertion by his wife for upwards of three years before the date of presentation of the petition. The evidence on that issue is clear, and desertion as from 1946 has been established. The husband is accordingly entitled to his decree as prayed.

Decree nisi.

Solicitors: *E. H. Silverstone & Co.*

E. J.

[DURHAM CONSISTORY COURT.]

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 Sept. 26, 27;
 Oct. 14, 18;
 Nov. 14.

In re ST. MARY, TYNE DOCK (No. 2).

Wigglesworth
 Dep.Ch.

Ecclesiastical Law—Faculty—Ornaments—Extent and nature of faculty jurisdiction—Removal of illegal ornaments—Whether ciborium an illegal ornament.

A faculty was sought by seven parishioners to remove from their parish church certain ornaments on the ground that those ornaments had been used illegally, and in contravention and contempt of an order of the Consistory Court in 1954 in *In re St. Mary, Tyne Dock* [1954] P. 369; [1954] 2 All E.R. 339. The petition was resisted by the vicar and churchwardens, who counter-petitioned for a faculty to retain two ciboria:—

Held, (1) that the faculty jurisdiction is not punitive: *In re St. Saviour's, Hampstead* [1932] P. 134 applied.

(2) That where reservation of the Blessed Sacrament is sanctioned by the bishop, a faculty may be granted for the introduction of an aumbry.

In re Lapford (Devon) Parish Church [1955] P. 205 applied.

(3) That a ciborium, if not expressly covered by the ornaments rubric of the first Prayer Book of King Edward VI, is an article consistent with or subsidiary to the services of the Church of England, and as such is not forbidden by the rubric, and is the receptacle normally used to contain the Blessed Sacrament where reservation takes place in an aumbry; it is also used to contain the Sacramental Bread during the administration of the Holy Communion.

[Reported by MICHAEL KELLY, Esq., Barrister-at-Law.]

(4) That the bishop has no power to vary a previous order of the Consistory Court. This can only be done by the Consistory Court.

In re St. Mary, Tyne Dock [1954] P. 369; [1954] 2 All E.R. 339 considered.

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PETITIONS for faculties.

By a petition dated November 21, 1955, Margaret Whitton and six other parishioners sought a faculty to remove from the church of St. Mary, Tyne Dock, in the Diocese of Durham, certain articles which had been the subject of an order of the Consistory Court in 1954,¹ on the ground that since the making of that order the petitioners had observed certain irregularities and malpractices in contravention of the order in respect of those ornaments. The complaints were: (1) that a small holy table at the east end of the south aisle had been used in an irregular manner, in that the cross, which the order of 1954 had authorized to be placed thereon, had on occasions been removed and in substitution a crucifix (which had been authorized to be retained until further order) had been placed thereon; (2) that a set of Stations of the Cross which had been allowed to be introduced during Holy Week had been displayed in the church outside Holy Week; (3) that a set of six wooden candlesticks authorized to be kept in some convenient place and used as required, had been used on occasion in substitution for two portable candleholders ordered to be removed; (4) that a pair of candleholders normally standing on the credence table had been used on occasions as portable candleholders in a manner in which they were likely to become of superstitious use, reverence and regard; (5) that an aumbry authorized to be retained had been used on occasions as a receptacle for retaining a ciborium which had been ordered to be removed by the order of 1954; and (6) that the crucifix above referred to had been used on the holy table in the south aisle. The petition further alleged that in contravention and contempt of the order of 1954 the vicar and churchwardens had retained four articles or replaced them with others of a similar kind. It was complained (a) that a ciborium, the removal of which had been ordered, or one like it, had been placed in the aumbry; (b) that a small hand-bell had been introduced into the church, and that a cord or rope had been led from the belfry through a hole in the roof and had been used to ring the church bell at the times and in the manner in which the sanctuary gong, ordered to be removed by the order of 1954, had been used;

¹ [1954] P. 369; [1954] 2 All E.R. 339.

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(c) that other candleholders had been used in place of a pair of portable candleholders; and (d) that other candleholders of a similar kind had been used at least once in service in or within the precincts of the church in place of a pair of outdoor portable candleholders which had been ordered to be removed.

The petition was resisted by the vicar and churchwardens, who were supported by a unanimous resolution of the parochial church council. The vicar and churchwardens by a counter-petition dated May 26, 1957, sought a faculty for the retention of two ciboria, both of which had been in the church for many years, but without a faculty.

Kenneth Elphinstone and *Michael Kelly* for the vicar and churchwardens. The present proceedings are taken under the faculty jurisdiction and are not punitive in nature: *In re St. Luke's, Newcastle*,² and *In re St. Saviour's, Hampstead*.³ The whole of these proceedings are misconceived, since if a person has done wrong in a criminal sense and has committed a contempt, as has been alleged, that contempt should be proceeded against either by moving the High Court for committal or by seeking a monition in the Consistory Court: *Rex v. Editor of Daily Herald, Ex parte Bishop of Norwich*.⁴ If the aggrieved person does not avail himself of those remedies, but comes to the Consistory Court again, the matter must be dealt with de novo, and in these proceedings only under the faculty jurisdiction. There is no contempt in this case, since the order of 1954 specifically provided a remedy to the petitioners if the vicar and churchwardens failed to carry out the provisions of the order within a limited time. The position is analogous to that propounded in Maxwell on Construction and Interpretation of Statutes, 10th ed., p. 395: "If the statute which creates the obligation, whether private or public, provides in the same section or passage a specific means or procedure for enforcing it, no other method other than that thus provided can normally be utilized for that purpose." The case for the petitioners is founded on contravention and contempt of a Consistory Court order, and where allegations of this sort are made they must be strictly proved. [Counsel then dealt with the individual ornaments and the evidence and continued:] The two ciboria are neither illegal nor improper, and no ritual or doctrinal significance attaches to them; they are merely lidded chalices and are fit and proper receptacles for containing the

² (1909) Unreported.

³ [1932] P. 134.

⁴ [1932] 2 K.B. 402, 407.

Blessed Sacrament when it is reserved. That all reasonable steps should be taken to secure the sacred elements appears from *In re St. Mary Magdalene, Altofts*.⁵ As to the aumbry, there is clear authority both in *In re St. Mary Magdalene, Altofts*⁵ and *In re Lapford (Devon) Parish Church*⁶ for allowing an aumbry where the bishop of the diocese has sanctioned the practice of reservation in the church concerned.

H. S. Ruttle for the parishioners. The case for the petitioners is for the removal of articles from the church; as it is no part of the petitioners' case to take proceedings for contempt, or to invoke the criminal jurisdiction, it is unnecessary to discuss the law as to proceedings for contempt. Most of the articles were retained in breach of the previous order of the court. [Counsel then dealt with the individual ornaments and continued:] As to one of the two ciboria, there had never been a faculty granted in respect of it. It should be removed, since it was an illegal ornament and forbidden by the ornaments rubric: see *Martin v. Mackonochie*.⁷ Reservation as such is illegal, and a ciborium, being an ornament used in connexion with an illegal practice, is therefore also illegal. *In re Lapford (Devon) Parish Church*⁸ was wrongly decided.

[THE DEPUTY CHANCELLOR. Is not a ciborium or something like it contemplated in the limited form of reservation enjoined by the rubrics in the Order for the Communion of the Sick in the first Prayer Book of King Edward VI?⁹ How do you suggest that the practice of reservation should be conducted if I order the ciborium to be removed?]

Reservation can be decently carried out, if necessary at all, in a chalice and paten.

Cur. adv. vult.

⁵ See Note, post, p. 172n.

⁶ [1955] P. 205.

⁷ (1868) L.R. 2 P.C. 365, 390.

⁸ [1955] P. 205.

⁹ "... But if the sicke persō be
"not hable to come to the churche,
"and yet is desirous to receyue the
"communion in his house, then he
"must geue knowlage ouer night, or
"els early in the morning to the
"curate, signifying also howe many
"be appoynted to communicate with
"hym. And yf the same daye there be
"a celebracion of the holy cōmunio[n]
"in the churche, then shall the priest
"reserue (at the open commuio[n]) so

"muche of the sacrament of the body

"and bloud, as shall serue the sicke

"person, and so many as shall com-

"municate with hym (yf there be

"any.) . . .

"¶ And yf there be moe sicke

"persons to be visited the same day

"that the curate doth celebrate in

"any sicke mā's house; then shall

"the curate (there) reserue so muche

"of the sacramente of the body and

"bloud: as shall serue the other sick

"persons, and suche as be appoynted

"to communicate with them (yf there

"be any). And shall immediately

"cary it, and minister it unto them."

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Nov. 14. WIGGLESWORTH Dep.Ch. read the following judgment: This case relates to certain articles in the parish church of St. Mary, Tyne Dock, in the Diocese of Durham. It was described by Mr. Ruttle in his opening speech as a sequel to the proceedings relating to the same church which came before Hylton-Foster Ch., then Chancellor of the Diocese, in the years 1953 and 1954. In those proceedings Hylton-Foster Ch. had to deal with three petitions, first a petition on the part of the vicar and churchwardens (then, as now, the Rev. Richard Louis Hilditch, Norman Edward Lorensen and Robert Henry Hickman) and 58 others who sought a faculty to introduce into the church a statue of the Virgin and Child; secondly, a petition on the part of Elsie Collingwood, Margaret Ann Whitton, William Finch and eight others who sought a faculty to remove 30 articles from the church; and, thirdly, another petition on the part of the vicar and churchwardens who sought a faculty to introduce into, or confirm the retention in, the church of some, if not all, of the 30 articles and certain other articles. Each of these petitions was opposed. For convenience Hylton-Foster Ch. called the vicar and churchwardens and their associates "the "petitioners," and Miss Collingwood and her associates "the "opponents."

Hylton-Foster Ch.'s order in the earlier proceedings was dated July 15, 1954, and I will refer to it as the order of 1954; by it he confirmed the introduction into the church of 29 articles (numbered 1 to 29 in the order of 1954), and ordered the removal from the church within three months from the date thereof of six articles (numbered 30 to 35 in the order of 1954). As regards the 29 articles, some of them were authorized to be retained in the church only "until further order": as regards the six articles ordered to be removed, the order of 1954 provided that in the event of the petitioners failing to lodge a declaration with the registrar within 14 days from the date of service of copies of the order of 1954 upon them or their solicitors signifying their consent to remove these articles within the three-month period, a faculty should issue to the opponents authorizing the opponents to remove them. A clear declaration was lodged within the time prescribed as regards the articles numbered 31 to 35, but in the case of article No. 30 (which comprised a tabernacle and a ciborium) the vicar, in a letter to the registrar dated July 27, 1954, which referred to article No. 30 as if it had comprised a tabernacle alone, asked if it would be sufficient if the tabernacle were made unusable, a course to which he said the Bishop of

Durham had agreed: the registrar replied that the vicar was bound to remove the tabernacle by October 15, 1954, or an order would issue to the opponents authorizing them to remove it: the vicar was told that the registrar was accepting the vicar's letter as his official declaration signifying his consent to remove the articles by October 15, 1954: in consequence, no faculty was issued to the opponents authorizing them to remove them.

The present case is correctly described as a sequel to these earlier proceedings: it involves two petitions, first, a petition dated November 21, 1955, on the part of some of the persons called "the opponents" in the earlier proceedings, namely, Mr. Finch, Miss Whitton and five others, who seek a faculty for the removal of some of the articles which were the subject-matter of the earlier proceedings, and, secondly, a petition dated May 26, 1957, on the part of some of the persons called "the petitioners" in the earlier proceedings, namely, the vicar and churchwardens, who seek a faculty to confirm the retention in the church of two ciboria, the removal of one of which had been ordered in the earlier proceedings. Each of these petitions is opposed. For convenience I shall continue to describe the two sides in the same way as Hylton-Foster Ch. described them, and will call the vicar and churchwardens "the petitioners," and Mr. Finch, Miss Whitton and their two associates "the opponents."

In the earlier proceedings the petitioners were represented by Mr. Garth Moore and the opponents by Mr. Ruttle. Since then Mr. Garth Moore has succeeded Hylton-Foster Ch. as Chancellor of the Diocese of Durham, but Mr. Garth Moore is disabled by the part he played in the earlier proceedings from hearing the present case, and has asked me to hear it for him. In the present case the opponents are again represented by Mr. Ruttle: the petitioners on this occasion have appeared by Mr. Elphinstone and Mr. Kelly. I should like to thank counsel for the assistance they have given me.

It was agreed that the issues arising from the two petitions should be tried together. The hearing took place in the Chapter House at Durham on September 26 and 27, 1957, when the evidence was concluded, and was with the consent of the parties continued in London on October 14 and 18, 1957, when the legal argument was concluded.

I must now refer more particularly to the articles mentioned in the opponents' petition dated November 21, 1955, which is the origin of this case: in doing so, I shall refer to them by the numbers by which they are referred to in the order of 1954.

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In the first instance, the opponents asked for a faculty to remove six articles on the ground that since the order of 1954 they had observed certain irregularities and malpractices in contravention of the order of 1954 in respect of the articles. The articles in question were: (i) article No. 2: this is a small holy table at the east end of the south aisle which had been authorized by the order of 1954 to be retained until further order; the complaint was that it had been used in an irregular manner in that the cross which the order of 1954 had authorized to be placed thereon had on occasions been removed and a crucifix, believed to be article No. 29, had been substituted (a crucifix which the order of 1954 had authorized to be retained until further order and had referred to as being on the east window sill of the vestry); (ii) article No. 3: this is a set of Stations of the Cross which Hylton-Foster Ch. in his judgment had allowed to be introduced during Holy Week, and the complaint was that they had been displayed in the church outside Holy Week; (iii) article No. 17: this is a set of six wooden candlesticks authorized by the order of 1954 to be kept in some convenient place and used in the church as required; the complaint was that all or any two of them had been used on occasions in substitution for article No. 32 (two portable candleholders the removal of which had been ordered by the order of 1954); (iv) article No. 18: this is a pair of candleholders normally standing on the credence table, the retention of which until further order had been authorized by the order of 1954; the complaint was that they had been used on occasions as portable candleholders in substitution for article No. 32 already mentioned in a manner in which they were likely to become of superstitious use, reverence and regard; (v) article No. 21: this is an aumbry authorized to be retained by the order of 1954; the complaint was that on occasions it had been used as a receptacle for the purpose of retaining a ciborium the same or similar to article No. 30, which comprised a tabernacle and ciborium both of which had, as already mentioned, been ordered to be removed by the order of 1954; (vi) article No. 29: this is the crucifix from the vestry which, it was alleged, had been used on the holy table in the south aisle.

In the second instance, the opponents in their petition alleged that in contravention of the terms of the order of 1954, and in contempt thereof, the petitioners had retained four articles or replaced them with other articles of a similar kind. The four articles were: (a) article No. 30: this article had consisted of a tabernacle and ciborium the removal of both of which had been

ordered by the order of 1954: the tabernacle had been removed in obedience to the order of 1954, but the complaint was that the ciborium or one like it had been placed in the aumbry (article No. 29); (b) article No. 31: this consisted of a sanctuary gong and two sanctuary bells the removal of which had been ordered by the order of 1954, and the complaint was that in substitution therefor a small hand-bell had been introduced into the church and used on many occasions, and that also in substitution therefor a cord or rope had been led from the belfry through a hole in the roof and had been used to ring the church bell at the times and in the manner in which the sanctuary gong had been used; (c) article No. 32: this was a pair of portable candleholders which had been ordered to be removed, and the complaint was that other candleholders had been used in their place; (d) article No. 33: this was a pair of outdoor portable candleholders which had also been ordered to be removed, and the complaint was that they or candleholders of similar kind had been used on at least one occasion in services in or within the precincts of the church.

This recurrence of litigation at St. Mary, Tyne Dock, was a matter of concern to the Archdeacon of Durham in whose archdeaconry the parish is situate. The archdeacon considered that it was his duty to intervene between the parties who were about to re-engage in conflict in order to prevent a second trial in this court; I consider that he was right to try and I am sorry he failed: litigation in a case of this kind cannot possibly benefit a parish and is bound to be unedifying. The archdeacon interviewed the petitioners and the opponents separately and, as a result of the advice he gave, the vicar wrote a letter to the archdeacon which is dated January 13, 1956, and is in the following terms: "As a basis of negotiation with the seven petitioners, who have lodged the petition (dated November 21, 1955) with the diocesan registrar, I have undertaken for the time being and for the foreseeable future to make the following modifications in the use of ornaments at St. Mary's, Tyne Dock:—

" 1. That the small hand-bell, mentioned in section 8b of the petition, shall be removed from the church.

" 2. That the rope led from the belfry to the west end of the church (section 8b) shall be made unusable by being hitched up in the gallery at a height which puts it out of reach.

" 3. That the two wooden candlesticks (mentioned in section 8c) shall no longer be moved during the course of a service.

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“They will, however, be placed in the church before certain services and removed afterwards (as is allowed in the confirmatory faculty). The servers will hold small lighted candles without holders at the reading of the Holy Gospel and whenever the Blessed Sacrament is removed from the aumbry to the altar for renewal. This we believe is an essential part of the expression of our reverence to our Lord.

“4. With regard to the substitution of a crucifix for a cross on the portable altar, I have decided to celebrate at this altar with two candles only and no ornament in the centre. The large brass cross makes reverent celebration impossible, and the confirmatory faculty states that ‘all or any’ of the ornaments may be used. While the celebration is in progress the brass cross will be placed in the sacristy. . . . I shall be grateful if you will use your influence to persuade the petitioners not to insist on the removal of the additional bell-rope. If it is taken away, our lady-caretaker will be unable to toll the bell at funerals. We shall, of course, continue to ring the tower bell at the consecration on Sundays.”

It will be noted that this letter says nothing about the Stations of the Cross or the ciborium, but amounts to an admission that until then the order of 1954 had as regards the other matters raised by the opponents’ petition been disobeyed in letter or in spirit or had at least been evaded.

At first it was hoped that the vicar’s undertaking might be sufficient for the opponents and these proceedings remained dormant for some months. The opponents were not, however, satisfied, and on October 6, 1956, Garth Moore Ch. took the neutral step of decreeing citation and thereafter had nothing further to do with the case. The petitioners entered an appearance in opposition: their first step was to apply to strike out of the opponents’ petition the allegations relating to all the articles mentioned in the petition other than the aumbry and the ciborium: this application I heard and dismissed in chambers last February. The petitioners filed their act on petition on May 24, 1957, and at the same time counter-petitioned for a faculty to retain the ciborium (article No. 30) and another ciborium which had been in the church for many years but had not previously been the subject-matter of faculty proceedings. These two ciboria are of different sizes, article No. 30 being the larger: in order to distinguish them, I will refer to article No. 30 as “the large ciborium” and to the other one as “the small

"ciborium." The opponents entered an appearance in opposition to the counter-petition and filed their act on petition on September 16, 1957. The petitioners are supported by a unanimous resolution of the Parochial Church Council passed on May 14, 1957.

Before I deal with the matters in dispute in this case it will be convenient if I refer generally to the principles which govern the exercise of the faculty jurisdiction. In this respect Mr. Elphinstone referred me to two cases. The first was *In re St. Luke's Church, Newcastle*,¹ where Kempe Ch., in the Consistory Court of Newcastle, said: "Whether or not a faculty "shall be granted for the introduction into, retention in, or "removal from a church of any particular thing, which can be "lawfully introduced into it; and whether such introduction, "retention, or removal shall be effected in the manner proposed "by the parties before the court, or be sanctioned subject to "such variations as seem proper to the judge, is a matter "entirely in the judicial discretion of the latter, who in the "exercise of that discretion is bound to consider not only the "interests of the parties to the suit before him but also those "of present and future parishioners. . . . In the present proceedings the court has no power to punish the vicar or churchwardens for any breach of the law they may have committed "in introducing these articles into the church and using them "there, or to issue a monition of them ordering them not to "repeat such offence. Its power is limited to authorizing the "removal from or retention in the church (including a consecrated vestry forming part of it) of things which are actually "in it, and it cannot empower the removal of anything from a "building which is not part of the church or under its "jurisdiction."

The second was *In re St. Saviour's, Hampstead*,² where Errington Ch., in the Consistory Court of London, said: "It "may be useful to refer to the general principles guiding this "court in faculty cases. It has first to be borne in mind that "they have no relation to criminal proceedings against a clergyman for illegal services or ceremonies. Evidence as to such "services or ceremonies, though it cannot be wholly rejected, "is only relevant so far as it indicates a danger of the ornaments "complained of being used for superstitious purposes. In the "absence of such evidence the object of the faculty jurisdiction

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¹ (1909) Unreported.

² [1932] P. 134, 138.

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"is not to hamper a clergyman by impeding his work. He is responsible for the religious welfare of his parish, and it is not the province of this court to criticize his teaching; still less to discourage his efforts by withdrawing such symbolic help as church decorations may give. On the other hand, there are, of course certain ornaments which the court has no power to sanction, as being outside the Ornaments Rubric." I need hardly say that I fully accept these passages as accurate statements of the law applicable to the exercise of the faculty jurisdiction.

I ought also to say something about the effect of a faculty. First, as its name indicates, it confers liberty on a person to do something; it does not command him to do anything. Secondly, a faculty not expressed to be "until further order" once granted cannot be recalled unless obtained by fraud: the grantee can surrender it, if he chooses, but unless he does it remains good and valid even against the ordinary himself (*Fuller v. Lane*,³ per Sir John Nicholl, Dean of Arches). Lastly, a faculty expressed to be granted "until further order" can be recalled against the will of the grantee: the insertion of these words enables the court to retain control of the subject-matter of the faculty and to recall the faculty if, for instance, there is a change in the relevant circumstances, or a condition inserted in the faculty has not been obeyed, or the subject-matter of the faculty becomes an object of unlawful ceremonial use or of superstitious use or reverence.

I will now deal with the matters in dispute, which fall under five heads. The first relates to the holy table in the south aisle (article 2) and the crucifix in the vestry (article 29). The petitioners admit that the brass cross which Hylton-Foster Ch. said could be placed on this holy table was on occasions removed and replaced by the crucifix, but they say (and there was no evidence to the contrary) that the crucifix has not been so used since the vicar's undertaking to the archdeacon given nearly two years ago. The vicar had no authority to put the crucifix on this holy table and ought not to have done so: he has full authority to remove the cross when he celebrates and continues to do so. I cannot regard the putting of a crucifix on a holy table during the period between October, 1954, and January, 1956, as such an irregularity or malpractice in contravention of the order of 1954 (to use the language of the opponents' pleading) as would

³ (1825) 2 Add. 419, 431.

warrant the grant of a faculty for the removal of either crucifix or holy table and decline to grant one. In so deciding, I expect and rely on the vicar to continue to keep his undertaking and remind him that the order of 1954 in this respect continues in force only "until further order."

Secondly, there are the Stations of the Cross (article 3). In his judgment Hylton-Foster Ch. said that these could only be put up in the church during Holy Week: in the year 1955 they were in fact put up during the week before, owing, so the vicar said, to a mistake: in 1956 and 1957 the direction of Hylton-Foster Ch. was observed and the vicar undertakes to continue to observe it. I regard this isolated slip as trivial in character and I cannot regard it as justifying a faculty for removal; accordingly, I leave the order of 1954 in force "until further order" so far as the Stations of the Cross are concerned.

Thirdly, there is the matter of the candlesticks or candleholders (articles 17, 18, 32 and 33). The portable candleholders (articles 32 and 33) are no longer in the church and no relief is now required so far as they are concerned. The complaint is that candlesticks authorized to be retained (articles 17 and 18) were used in place of the portable candleholders to be removed and that such use contravened the order of 1954. There was good ground for this complaint. As soon as the order of 1954 came into force the vicar sought to evade it so far as these candlesticks are concerned. It is admitted that candlesticks were carried in place of the banished portable candleholders until January, 1956, and that this was contrary to the spirit if not the letter of the order of 1954. In his letter to the archdeacon in January, 1956, the vicar undertook not to use the candlesticks again but said that servers would carry candles without holders. It is admitted that candles were carried between January and October, 1956: this, too, was in breach of the spirit of the order of 1954 whether the candles were in candlesticks or not. There is in fact an acute clash of testimony as to whether candlesticks were used during this period: the opponents' witnesses say they were; the petitioners' witnesses say they were not. I do not consider it necessary for me to say that I believe one set of witnesses and disbelieve the other. What I do not believe is that any witness deliberately set out to commit perjury in this case: anyone can be mistaken in his or her recollection as to whether it was $1\frac{1}{2}$ years ago or $2\frac{1}{2}$ years ago that a candle which was certainly carried was carried in a candlestick. The only

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contemporary record, Miss Whitton's diary, is silent on the point, since that only speaks of candles being carried without making mention of candlesticks. In any case I do not regard the matter as of much importance: the important thing is that candles continued to be carried contrary to the spirit of the order of 1954 notwithstanding the archdeacon's intervention. This practice only stopped in October, 1956 (the month in which citation issued), when the petitioners consulted their solicitors and received advice on which they wisely acted. The petitioners admit the foolishness of their ways, apologise, and say they will not err in this respect again. The opponents seek the removal of all eight candlesticks comprised in articles 17 and 18: as regards the six candlesticks comprised in article 17, the order of 1954 did not contain the limiting words "until further order" and it may be that I have no power to grant a faculty for their removal, but if I have power I do not propose to exercise it: nor do I propose to exercise the power I undoubtedly have over the two candlesticks normally on the credence table comprised in article 18. I decline to order the removal of these candlesticks because I do not consider it necessary while the conditions which have prevailed since October, 1956, continue. The removal of articles in 1954 caused real distress to the bulk of the congregation and I am reluctant to add to that distress now by ordering further removals unless I consider it absolutely necessary. The removal of candlesticks would be in the nature of a punishment of the petitioners which is not the concern of the faculty jurisdiction: it would not, I consider, be in the interests of the bulk of the congregation, which is a matter of concern in the exercise of the faculty jurisdiction. In saying this, I am taking into account that the petitioners include the two churchwardens and that they are supported by a unanimous parochial church council and that the opponents are only seven in number.

I will deal next with the sanctuary gong and two sanctuary bells (article 31). There is no dispute as to fact in this respect. Hylton-Foster Ch. held that these were illegal ornaments, that the opponents were entitled to have the law applied to them, and ordered their removal. It is admitted that when they were removed the petitioners introduced a hand-bell and also caused a cord or rope to be led from the belfry through a hole in the roof to the interior of the church and that both the hand-bell and, with the assistance of the cord or rope, a bell in the belfry were rung on the same occasions in the services as those when the

gong and bells removed under the order of 1954 had previously been rung. The less said about these unworthy subterfuges the better. They ceased in January, 1956, and have not been resumed. The vicar very properly apologized for them, and Mr. Elphinstone said that these practices would not occur again: he told me that the hand-bell was no longer in the church, and on this footing no relief is required in respect thereof. As regards the cord or rope, he said that he would submit to its removal if that would remove suspicion but that he wished for it to be retained for use at funerals: I consider that its removal would assist to remove suspicion, and I will grant a faculty to remove it.

Lastly, I come to the aumbry (article 21) and the large ciborium (article 30): at the same time I will deal with the petitioners' counter-petition which relates exclusively to the large ciborium and the small ciborium. As regards the aumbry, Mr. Ruttle, very properly if I may say so, did not press for its removal although he reserved the right to question in a higher court the judgment in *In re Lapford (Devon) Parish Church*,⁴ where the late Dean of Arches, Sir Philip Baker Wilbraham, considered that a faculty could be granted authorizing the introduction of an aumbry in a case where the bishop has sanctioned the reservation of the Blessed Sacrament, and where there is compliance with the provisions of the rubric in the Alternative Order for the Communion of the Sick contained in the Prayer Book approved by the Church Assembly but rejected by the House of Commons in 1928. A judgment of the Court of Arches of Canterbury is not a binding authority in the Province of York, but is naturally treated with the greatest respect, in particular because the judge of the two provincial courts is required by statute to be the same person. In any case, therefore, I would have followed the *Lapford*⁵ judgment and allowed the aumbry to remain in view of the fact that the bishop has sanctioned the reservation of the Blessed Sacrament in this church.

The two ciboria have been in the church for some years. The large ciborium was given in 1935 by members of the Coverdale family in memory of their father: the small ciborium was given about eight years ago by members of the Youth Fellowship in memory of Irene Watkins, the daughter of Mrs. Hilda Emily Watkins, one of the opponents. The custom has been to use the large ciborium for reservation and the small ciborium in the celebration and administration of the Holy Communion, but the

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⁴ [1955] P. 205.

⁵ Ibid. 206.

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small ciborium has also been used for reservation when the large ciborium has been removed for cleaning or for use in the celebration and administration of the Holy Communion: the large ciborium is so used on occasions when there are more than 100 communicants. The large ciborium was formerly in the tabernacle and with the tabernacle was ordered to be removed from the church by Hylton-Foster Ch. The small ciborium has not hitherto been the subject of faculty proceedings. The large ciborium has not in fact been removed from the church: instead it has been used in the aumbry: in this respect the order of 1954 has never been obeyed, and the vicar in cross-examination stated that he was not prepared to obey it. The petitioners have pleaded that the use of the large ciborium in the aumbry was in accordance with the express instructions of the bishop given to the vicar at or about the time of the removal of the tabernacle. The inference to be drawn from the evidence of the vicar and Mr. Woodhouse, the treasurer of the parochial church council, who was called as a witness by the petitioners, is that the large ciborium was so used with the bishop's sanction. The bishop, however, had no power to vary the order of 1954. Hylton-Foster Ch. was sitting as a judge independent of the bishop and uncontrolled by any views of the bishop; compare *Ex parte Medwin*.⁶ If the petitioners were not content with the order of 1954 as regards the large ciborium they should not have disobeyed it, they should have appealed against it to the Chancery Court of York. The order of 1954 provided that if the petitioners did not lodge a declaration signifying their consent to remove (among other things) the large ciborium within the three-month period allowed, a faculty should issue to the opponents to effect the removal. The petitioners have been treated as having lodged such a declaration, but have not removed, and obstinately refuse to remove, the large ciborium. I cannot, as Mr. Elphinstone invited me to do, deal with his counter-petition as if the order of 1954 had never been made, or treat this part of the order of 1954 as a slip and, by changing it, convert the petitioners' disobedience into obedience. The opponents got an order for the removal of the large ciborium in 1954 and, in my view, they are entitled to have that order implemented. I shall therefore grant a faculty for the removal of the large ciborium, which will have to be disposed of by the churchwardens in such way as they think fit. The authority to remove will be granted to the

⁶ (1853) 1 E. & B. 609.

petitioners in the first instance: if they do not act on it within the time specified in the faculty the opponents will have authority to remove.

The petitioners also ask for a confirmatory faculty for the small ciborium. Mr. Ruttle argued that I could not grant such a faculty even if I was otherwise disposed to do so because a ciborium was an ornament forbidden by the ornaments rubric, and he referred me to the well-known passage on the ornaments rubric in the opinion of the Judicial Committee of the Privy Council in *Martin v. Mackonochie*.⁷ In my view a ciborium is not an illegal ornament. A ciborium is defined in the Oxford Dictionary of the Christian Church (1957) as "a chalice-shaped vessel, with a lid, used to contain the Sacramental Bread." It is not only used in connexion with reservation: it is also used to contain the Sacramental Bread during the administration of the Holy Communion. If it is not expressly covered by the rubric, I consider that it is an article consistent with or subsidiary to the services of the Church of England and, as such, not forbidden by the rubric. Further, as regards the small ciborium, I am not affected by any previous order. Mr. Elphinstone argues that it is highly desirable to have a ciborium to contain the Blessed Sacrament where reservation takes place in an aumbry, and I agree with him. A ciborium is the receptacle normally used for this purpose, and I consider that the small ciborium can and should be used for this purpose in this church. I propose, therefore, to grant a faculty confirming the retention of the small ciborium.

It only remains to deal with the costs of this case. If the petitioners had accepted the order of 1954 loyally I do not consider that these proceedings would ever have begun. When the opponents began them, they asked for relief in two matters in which, in my view, no relief was called for, but in other respects I consider that they had a grievance. Had they been more charitably minded they might have been content with the result of the archdeacon's intervention, but the petitioners' continued use of lights after such intervention contrary to the spirit of the order of 1954, and the petitioners' continued disobedience (which continues today) to that order as regards the large ciborium afford some explanation why these proceedings have continued to their bitter end. On the whole, I consider that justice will be done if the petitioners pay the opponents' costs of the interlocutory

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⁷ (1868) L.R. 2 P.C. 365, 390.

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proceedings which came before me in February and pay a half of the rest of the opponents' costs. Each party will pay the court fees incurred by that party: the petitioners will pay to the opponents a sum equal to the court fees payable by the opponents in respect of the interlocutory proceedings, and a sum equal to a half of the court fees payable by the opponents in respect of the rest of the proceedings.

The form of faculty will be settled in chambers.

Faculties decreed accordingly.

Solicitors: *Ralph W. T. Lubbock & Co., Newcastle-upon-Tyne; Trollope & Winckworth.*

NOTE.

[WAKEFIELD CONSISTORY COURT.]

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In re ST. MARY MAGDALENE, ALTOFTS.

Ecclesiastical Law—Faculty—Aumbry—Petition to convert existing piscina into aumbry—Reservation of Blessed Sacrament—Duty of Chancellor to ensure security of sacred elements.

PETITION for faculty.

The vicar and churchwardens of St. Mary Magdalene, Altofts, in the archdeaconry of Pontefract, petitioned (*inter alia*) for a faculty to make use of an existing piscina in the north wall of the chancel by converting it into an aumbry for the reservation of the sacred elements for the benefit of sick parishioners. The petition was unopposed.

VAISEY Ch. This application is for leave to make use of an existing piscina, which is built into the north wall of the chancel, by converting it into a safe which is to be used for the purpose of reserving the sacred elements for the benefit of sick parishioners. It is a strange thing to find a piscina on the north wall of the chancel. The south wall is the usual and proper place for it, and quite obviously it cannot be used for the purpose for which it was intended. As regards the provision of an aumbry for the purpose which I have mentioned, the consistory courts are unfortunately divided in opinion as to the proper steps which ought to be taken in such a case, but for my part I consider that if there is no opposition to such a suggestion my duty is shortly as follows. If I am told that the sacred elements are to be reserved in a church with the sanction or, at any rate, not contrary to the directions or express

wishes of the bishop (that is a fact to which I am bound to pay attention), I regard it as my duty as chancellor of the diocese and, as such, custodian of all churches in it, to see that such reasonable steps are taken to secure the sacred elements, which are in point of fact to be reserved in the church, from anything in the nature of desecration or profanation. If I were to refuse this application, it might well be that the vicar would be driven to house the consecrated bread and wine in some unworthy place such as a cupboard in the vestry, and in my view I am fully justified in permitting the construction of this aumbry or safe in the place now occupied by the piscina, and I shall direct that it may continue to be part of the furnishing and fitting out of this church until further order. By those words I mean that if at any time it is proved to me by any parishioner that an improper use is being made of that which I am now permitting, improper in any direction, that is to say, supposing that the aumbry intended for another purpose were to be used for some common purpose such as housing of cleaning materials or brushes, or on the contrary at the other extreme it were made the focus of unsuitable acts of worship, then in any such case as that I desire to retain control of the position so that I may reconsider it and, if necessary, refute my order. Subject to these observations I am willing that a faculty should issue for the construction of this aumbry and its retention until further order. I think that the faculty should also extend to cover a suitable curtain rod and pendant curtain which will cover up the front of the safe or box, and the faculty will also refer to the fact that the safe must be fitted with a suitable lock provided with proper keys.

No application is made to me for a pendant lamp to hang in front of the aumbry and such a lamp, as is well known, is common and may perhaps be regarded as part of the ordinary fittings of an existing aumbry, and I venture to think that if there is an aumbry, and if the sacrament is reserved in it, the silent testimony of a hanging lamp is much the best way of indicating to the parish that the aumbry is there, and is being used for the sacred purpose for which it was intended. If there is no lamp so to give its witness, it may be necessary to put up not very desirable notices in the church porch and perhaps to refer to what should gradually come to be known in this parish as the natural and ordinary state of affairs. As the application does not include the lamp in so many words, and as the parochial church council has not had an opportunity of considering whether there should be one or not, I do not propose in this case to allow the provision of a lamp, but I do agree to reserve liberty to apply to me, not by means of a fresh faculty but in an informal manner, for leave to place a pendant lamp in front of this aumbry, and such application I should consider with favour if it is supported by the apparently unanimous wish of the parish. There must be, of course, no inscription on the aumbry or anything of that kind. The design shows a perfectly plain fitting and for that I applaud and am grateful.

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ST. MARY
MAGDALENE,
ALTOFTS,
In re.

Vaisey Ch.

Faculty as prayed.

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Feb. 24, 25;
Mar. 7.

Willmer J.

MIGUEL SANCHEZ & COMPANIA S.L. v. RESULT
(OWNERS). NELLO SIMONI LTD., THIRD PARTY.
THE RESULT.

[1957 M. 2749.]

Practice and Procedure—Parties—Joinder—Application by third parties to be joined as co-defendants—Purpose of joinder to counterclaim against plaintiffs—Jurisdiction—R.S.C., Ord. 16, r. 11.

The third parties agreed to buy from the plaintiffs 6,000/7,000 cases of oranges f.o.b. Almeria and chartered the *Result* and the *Juno* for the carriage thereof to the United Kingdom. The third parties nominated the *Result* for the carriage of 3,500 cases and the *Juno* for the further 3,500 cases. The plaintiffs, under a bill of lading, shipped only 1,000 cases on board the *Result* and did not ship any cases on board the *Juno*. On the arrival of the *Result* in the United Kingdom, the defendants (owners of the *Result*) without the production of the bill of lading or the authority of the plaintiffs and, in return for and in consideration of an indemnity, whereby the third parties agreed to indemnify the defendants against all consequences of delivery, delivered the 1,000 cases of oranges to the third parties, who claimed that the property therein had passed to them. The plaintiffs commenced an action in rem against the owners of the *Result*, claiming damages for breach of the contract of carriage under the bill of lading, in that the defendants delivered the 1,000 cases of oranges, the property in which had remained in the plaintiffs, without the production of the bill of lading or the authority of the plaintiffs, and, alternatively, damages for conversion. The defendants served a third party notice on the third parties claiming an indemnity in the event of their being held liable to the plaintiffs. The third parties applied under R.S.C., Ord. 16, r. 11,¹ for an order that they be joined as co-defendants in the action so that they would be in a position to counterclaim against the plaintiffs claiming damages for breach of the contract of sale. The Admiralty Registrar ordered that the third parties be added as co-defendants, and, at the same time, issued third party directions that the third parties should be at liberty to appear at the trial of the action, and take such part as the judge should direct, and be bound by the result of the trial. The plaintiffs appealed against the order of the registrar joining the third parties as co-defendants:—

Held, (1) that the words “cause or matter” in Ord. 16, r. 11,¹ meant the action as it stands between the existing parties.

¹ R.S.C., Ord. 16, r. 11: “No
“ cause or matter shall be defeated
“ by reason of the misjoinder or non-
“ joinder of parties, and the court may
“ in every cause or matter deal with
“ the matter in controversy so far as
“ regards the rights and interests of

“ the parties actually before it. The
“ court or a judge may, at any stage
“ of the proceedings, either upon or
“ without the application of either
“ party, and on such terms as may
“ appear to the court or a judge to be
“ just, order . . . that the names of

(2) That the order asked for by the plaintiffs in the "cause or matter" affected the third parties in the enjoyment of their legal rights, in that the plaintiffs were claiming the property in the 1,000 cases of oranges shipped; but that, with regard to the third parties' proposed counterclaim in respect of the 6,000 cases of oranges which were not shipped, the legal rights sought to be asserted by this counterclaim were unaffected by the plaintiffs' claim in the "cause or matter."

(3) That the only reason which makes it "necessary" to add the name of a party to an action is so that that party may be bound by the result of the trial, and the question to be settled must be a question which cannot be effectually and completely settled unless that party is so joined.

(4) That, since under the third party directions the third parties were at liberty to appear at the trial and to take such part as the judge should direct, and would be bound by the result of the trial, the "cause or matter" was not liable to be "defeated" by the nonjoinder of the third parties as defendants, nor was it "necessary" to join the third parties as defendants in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the "cause or matter."

(5) That, since the plaintiffs were pursuing a remedy in rem against the ship, which, *prima facie*, they were entitled to pursue, it could not be said that the action was not properly constituted, and, therefore, the third parties were not parties "who ought to have been joined" in the first instance.

(6) Accordingly, since the "cause or matter" was not liable to be "defeated" by the nonjoinder of the third parties as defendants, nor were the third parties persons "who ought to have been joined" as defendants in the first instance, nor were the third parties persons whose presence before the court as defendants was "necessary" in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the "cause or matter," the court had no jurisdiction under Ord. 16, r. 11, to order that the third parties be added as defendants.

Amon v. Raphael Tuck & Sons Ltd. [1956] 1 Q.B. 357; [1956] 1 All E.R. 273 applied.

Montgomery v. Foy, Morgan & Co. [1895] 2 Q.B. 321; 11 T.L.R. 512 distinguished.

CHAMBERS SUMMONS.

The plaintiffs commenced an action in rem against the defendants' vessel *Result*. By their statement of claim, delivered on

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"any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the

"cause or matter, be added. . . .
 "Every party whose name is so added as defendant shall be served with a writ of summons . . . and the proceedings as against such party shall be deemed to have begun only on the service of such writ. . . ."

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January 11, 1958, the plaintiffs claimed that 1,000 cases of oranges, shipped on board the *Result* under a bill of lading dated Almeria, November 16, 1957, for carriage to Portsmouth, were delivered to the third parties, without the production of the bill of lading and without the authority of the plaintiffs, in breach of the contract of carriage under the bill of lading. In the alternative the plaintiffs claimed that the defendants were guilty of conversion.

On January 23, 1958, the defendants obtained leave to issue a third party notice, whereby they claimed an indemnity from the third parties on the grounds that the 1,000 cases of oranges were delivered in return for and in consideration of an undertaking in writing, and, that, under the terms of this undertaking, the third parties agreed to indemnify the defendants against all consequences of delivery.

By their defence, delivered on February 7, 1958, the defendants denied liability, alleging that the bill of lading was not a contractual document, and that the plaintiffs in shipping the oranges were acting as the agents of the third parties, who were the charterers of the *Result* under a charterparty dated October 25, 1957.

On February 7, 1958, the third parties issued a summons applying for the third parties to be added as co-defendants, and, at the hearing of the summons before the Admiralty Registrar, put in an affidavit sworn by one Nello Simoni, a director of the third parties.

In his affidavit Simoni deposed to the following facts: The 1,000 cases of oranges in question were part of the subject-matter of a contract, made on or about October 23, 1957, between the plaintiffs and the third parties, whereby the third parties agreed to purchase 6,000/7,000 cases of oranges at a certain price f.o.b. Almeria. The third parties chartered the *Result* for the carriage of these oranges with other goods of theirs to the United Kingdom. An agreement was made with a representative of the plaintiffs that payment for the oranges was to be made in part by an irrevocable credit, opened by the third parties in favour of the plaintiffs, and that the balance should be paid in London within 24 hours of the goods being delivered in the United Kingdom. The third parties opened a credit in respect of 3,500 cases of oranges, and cabled the plaintiffs nominating the *Result* to load 3,500 cases and the *Juno* to load another 3,500 cases. A further credit was then opened in respect of the 3,500 cases to

be shipped on board the *Juno*. Only 1,000 cases were available for shipment on board the *Result* and none were available for shipment on board the *Juno*. By reason of the plaintiffs' breach of their contract the third parties suffered damage, consisting of the loss of freight and loss of profit on the 2,500 cases not shipped on board the *Result*, and loss of profit on the 3,500 cases not shipped on board the *Juno*.

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Simoni concluded his affidavit by asking for an order that the third parties be added as defendants in the action so that the third parties will be in a position to counterclaim against the plaintiffs.

The Admiralty Registrar ordered that the third parties be added as co-defendants in the action and that the writ of summons be amended accordingly. At the same time the registrar issued third party directions ordering that the third parties be at liberty to appear at the trial of the action, and to take such part as the judge should direct, and be bound by the result of the trial.

The plaintiffs appealed against the order of the registrar ordering that the third parties be joined as co-defendants in the action.

Willmer J. adjourned the summons for judgment in open court.

H. V. Brandon for the plaintiffs.

A. E. Bolton (Sebag Shaw with him) for the third parties.

The following authorities and cases were cited in argument, which took place in chambers: Carver's Carriage of Goods by Sea, 10th ed., pp. 707-710; The Annual Practice, 1958, pp. 324 and 348; Benjamin on Sale, 8th ed., pp. 381-382; *Norris v. Beazley*²; *Vavasour v. Krupp*³; *Eyre v. Moreing*⁴; *Byrne v. Brown*⁵; *Moser v. Marsden*⁶; *Montgomery v. Foy, Morgan & Co.*⁷; *McCheane v. Gyles* (No. 2)⁸; *Norbury Natzio & Co. Ltd. v. Griffiths*⁹; *Bentley Motors (1931) Ltd. v. Lagonda Ltd.*¹⁰; *Dollfus Mieg et Compagnie S.A. v. Bank of England*¹¹; *Atid Navigation Co. Ltd. v. Fairplay Towage and Shipping Co. Ltd.*¹²;

² (1877) 2 C.P.D. 80.

³ (1878) 9 Ch.D. 351.

⁴ [1884] W.N. 58.

⁵ (1889) 22 Q.B.D. 657; 5 T.L.R.

255.

⁶ [1892] 1 Ch. 487.

⁷ [1895] 2 Q.B. 321; 11 T.L.R.

512.

⁸ [1902] 1 Ch. 911.

⁹ [1918] 2 K.B. 369.

¹⁰ [1945] 2 All E.R. 211.

¹¹ [1951] Ch. 33; 66 T.L.R. (Pt. 2)

559; [1950] 2 All E.R. 605.

¹² [1955] 1 W.L.R. 336; [1955] 1

All E.R. 698.

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*Amon v. Raphael Tuck & Sons Ltd.*¹³; *Edison & Swan United Electric Light Co. v. Holland.*¹⁴

Cur. adv. vult.

WILLMER J. read the following judgment: This is an appeal from an order made by the Admiralty Registrar on February 14, 1958, whereby it was ordered that the third parties be added as co-defendants in the action and that the writ of summons be amended accordingly.

[His Lordship referred to the matters relied on in the statement of claim, the defence and the third party notice. After stating the facts deposed to by Nello Simoni, a director of the third parties, his Lordship continued:] At the same time as the registrar made the order now appealed from, he issued third party directions, whereby it was ordered, inter alia, that the third parties should be at liberty to appear at the trial of the action and take such part as the judge should direct and be bound by the result of the trial.

It was intimated to me by counsel for the plaintiffs that the plaintiffs do not accept as accurate Simoni's version of the arrangement made with regard to the terms of payment, but contend that the third parties failed to open a credit in accordance with the arrangement which the plaintiffs say was made. It was, however, conceded that for the purposes of this summons I must proceed on the basis that the facts deposed to by Simoni are true.

I was informed that at the hearing before the registrar the parties did not attend by counsel, and that the registrar heard only a brief argument, in the course of which none of the authorities was called to his attention. I have had the benefit of a very full argument by counsel for both the plaintiffs and the third parties, in the course of which my attention has been called to a number of authorities, including the recent judgment of Devlin J. in *Amon v. Raphael Tuck & Sons Ltd.*,¹ where all the previous authorities are reviewed. It is now contended on behalf of the plaintiffs, (1) that in the circumstances of this case there is no jurisdiction to make an order, against the wish of the plaintiffs, adding the third parties as defendants, and (2), alternatively, if there is jurisdiction, it is a jurisdiction

¹³ [1956] 1 Q.B. 357; [1956] 1 All E.R. 273.

¹ [1956] 1 Q.B. 357; [1956] 1 All E.R. 273.

¹⁴ (1889) 41 Ch.D. 28; 5 T.L.R. 294.

which the court, in the exercise of its discretion, ought not to exercise on the particular facts of this case.

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The rule providing for the joinder of additional parties is R.S.C., Ord. 16, r. 11. It is not, I think, disputed that the third parties are entitled to the order sought only if they can bring themselves within the terms of that rule. [His Lordship read the relevant part of the rule and continued:]

Having regard to the terms of the rule, it appears to me that the questions to be determined on this summons are these. First, is the cause or matter liable to be defeated by the nonjoinder of the third parties as defendants? This, I think, means in effect: is it possible for the court to adjudicate upon the cause of action set up by the plaintiffs, unless the third parties be added as defendants? Secondly, are the third parties persons who ought to have been joined as defendants in the first instance? Thirdly, and alternatively, are the third parties persons whose presence before the court as defendants will be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter?

To each of these three questions the third parties contend that the answer must be in the affirmative. As to the first question, it is contended that the real issue between the parties turns upon the matters alleged in Simoni's affidavit, which not only affect the right of the third parties to succeed on the counterclaim sought to be set up, but also govern the question as to the plaintiffs' right of property in the oranges, which lies at the root of the cause of action set up by them. In such circumstances it is argued that unless the third parties are added as defendants, so that they can prove the facts alleged and set up their counterclaim, the cause or matter will be defeated. As to the second question, it is argued that the third parties ought to have been joined as defendants in the first instance, in the sense that a plaintiff, who deliberately chooses not to join as a defendant a party against whom, if his version of the facts is true, he has a cause of action, must take the risk of an application by such party to be joined. As to the third question, it is contended that, for the reasons already given, the court cannot effectually and completely adjudicate upon and settle all the questions involved in the cause or matter unless the third parties are added as defendants and given the opportunity of asserting their counterclaim in these proceedings.

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Many of the authorities in which Ord. 16, r. 11, has been considered were cited to me in the course of the argument. I do not find it necessary to refer to them in detail in this judgment, for they were exhaustively reviewed by Devlin J. only two years ago, in *Amon v. Raphael Tuck & Sons Ltd.*,² to which I have already referred. As pointed out by Devlin J., the earlier authorities are by no means easy to reconcile, and broadly speaking it is true to say that two views have been expressed as to the scope of the rule. Devlin J. himself, after reviewing the authorities, held himself bound by the decision of the Court of Appeal in *Moser v. Marsden*³ to decide in favour of what he called the narrower construction of the rule. This involved that he was unable to follow certain dicta, notably of Lord Esher in *Montgomery v. Foy, Morgan & Co.*,⁴ and *Byrne v. Brown*,⁵ in which a wider and more liberal view of the construction of the rule was expressed. Having read and re-read the very full judgment of Devlin J. it is sufficient for me to say that I am in agreement with his analysis of the decided cases, and am content to follow his view as to the true construction of the rule, with which I am happy to express my agreement. My difficulty is to apply the provisions of the rule, as so construed, to the particular facts of this case, which seem to me to raise questions rather different from those that have arisen in any of the decided cases.

In seeking to apply the rule, it is useful, I think, to start by reminding oneself of what Lindley L.J., in *Moser v. Marsden*⁶ described as the key to it. He said⁶: "In order to properly understand the rule we must look at the whole of it. It begins by saying, 'No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties' —that is the key to the whole section: if the court cannot decide the question without the presence of other parties, the cause is not to be defeated. . . ." That observation may be read in conjunction with the useful note which appears in the Annual Practice,⁷ among the notes to Ord. 16, r. 1, and which was referred to with approval by Wynn-Parry J. in *Dollfus Mieg et Compagnie S.A. v. Bank of England*.⁸ The

² [1956] 1 Q.B. 357.³ [1892] 1 Ch. 487.⁴ [1895] 2 Q.B. 321, 323; 11 T.L.R. 512.⁵ (1889) 22 Q.B.D. 657; 5 T.L.R. 255.⁶ [1892] 1 Ch. 487, 490.⁷ 1958 ed., p. 324.⁸ [1951] Ch. 33, 39; 66 T.L.R. (Pt. 2) 559; [1950] 2 All E.R. 605.

note says: "Generally in common law and Chancery matters
 "a plaintiff who conceives that he has a cause of action against
 "a defendant is entitled to pursue his remedy against that
 "defendant alone. He cannot be compelled to proceed against
 "other persons whom he has no desire to sue. . . .

"Generally speaking, intervention can only be insisted upon
 "in three classes of case, namely:

"(A) In a representative action where the intervener is one
 "of a class whom plaintiff claims to represent. . . .

"(B) Where the proprietary rights of the intervener are
 "directly affected by the proceedings. . . .

"(C) In actions claiming the specific performance of con-
 "tracts where third persons have an interest in the question
 "of the manner in which the contract should be performed."

It is not suggested that the facts of this case fall within class
 (A) or class (C). As to class (B), within which the third parties
 must bring this case if they are to succeed, it is, I think,
 proper to observe that (though this has apparently not so far
 been noted by the editors of the Annual Practice) the ambit
 of the class has been materially widened as a result of the
 decision of Devlin J. in *Amon v. Raphael Tuck & Sons Ltd.*⁹
 The effect of this decision is to include any case in which the
 order for which the plaintiff asks directly affects the intervener,
 not in his commercial interests, but in the enjoyment of his
 legal rights.

Applying this test, I do not see how it is possible to avoid
 the conclusion that the order asked for by the plaintiffs in this
 case does affect the third parties in the enjoyment of their
 legal rights. It is alleged by the plaintiffs in paragraph 1 of
 the statement of claim that the 1,000 cases of oranges in dispute
 were the property of the plaintiffs. This is an allegation which
 the plaintiffs will have to prove if they are to succeed on their
 claim. But it is an allegation which, I am assured by counsel
 for the third parties, the third parties are concerned to dispute;
 they wish, I am told, to contend that the property in the
 oranges had passed to them. I am bound to say that Simoni's
 affidavit is singularly uninformative on this aspect of the case.
 It contains no specific allegation that the property had passed,
 nor does it set out any facts from which the court could be
 invited to infer that the property had passed. Nor, indeed, does

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⁹ [1956] 1 Q.B. 357, 386.

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it in terms disclose any desire on the part of the third parties to be heard on the plaintiffs' claim to be the owners of the oranges. I think, however, that Mr. Bolton was justified in his submission that, although not stated in terms, it is implicit in the affidavit of Simoni that, according to his contention, the property had passed. At all events, I am prepared to give the third parties the benefit of the doubt, and on that basis it seems clear to me that the plaintiffs' claim is one that does affect the third parties in the enjoyment of their legal rights.

But this, in my judgment, does not conclude the matter. I still have to consider whether the third parties are persons whom it is necessary to add as defendants in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter. I agree with the observation of Devlin J. in *Amon v. Raphael Tuck & Sons Ltd.*¹⁰ that "The only reason which makes it necessary "to make a person a *party* to an action is so that he should "be bound by the result of the action, and the question to be "settled therefore must be a question in the action which "cannot be effectually and completely settled unless he is a "party." Here the third parties are already parties to the action and under the terms of the third party directions they are at liberty to appear at the trial and take such part as the judge shall direct. If they do desire to contest the plaintiffs' claim to be the owners of the 1,000 cases of oranges, this is a matter on which they will already have the right to be heard at the trial, and they will be bound by the result. It was submitted by Mr. Bolton that the fact of his clients being already third parties to the action is an entirely irrelevant consideration when the question at issue is one of jurisdiction. I cannot agree. The jurisdiction to add defendants depends on the rule, and the rule permits them to be added only when it is necessary to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter. So far as concerns the plaintiffs' claim in respect of the 1,000 cases of oranges the court is already in a position to do this with the action constituted as it is at present.

If that were all, it would be an end of the matter. But I have yet to consider the counterclaim which the third parties desire to put forward against the plaintiffs. It was very properly

¹⁰ [1956] 1 Q.B. 357, 380.

conceded by Mr. Brandon that, if the order asked for by the plaintiffs would directly affect the third parties in the enjoyment of their legal rights, it would not matter that the method sought to be adopted by the third parties to protect such legal rights was by way of counterclaim against the plaintiffs. But the counterclaim must be such as will serve to protect the legal rights threatened by the plaintiffs' action. I agree with Mr. Brandon's submission that the mere assertion of a counterclaim, in respect of matters which happen to be connected with the subject-matter of the original claim, does not make it necessary to add the third parties as defendants, unless the legal rights sought to be asserted by the counterclaim are rights which are directly affected by the plaintiffs' claim.

If the third parties here were seeking to assert a counterclaim in respect of the 1,000 cases of oranges which form the subject of the plaintiffs' claim, then I apprehend it might well be necessary to add them as defendants, so as to enable them to protect their legal rights in relation to the oranges, the subject-matter of the plaintiffs' claim. Suppose, for example, that the 1,000 cases of oranges with which the plaintiffs' claim is concerned had been delivered, not to the third parties, but to some other person, e.g., a warehouseman. If the third parties desired to assert a claim to the oranges, in opposition to the plaintiffs' claim, then I apprehend there could be no question but that the third parties ought to be added as defendants, so as to enable them to protect their rights by counterclaim. Such a case would be covered by the decision in *Montgomery v. Foy, Morgan & Co.*¹¹ But here no such state of affairs exists. The third parties have already had the oranges, the subject of the plaintiffs' claim. Their only concern with these oranges is to defeat the plaintiffs' claim for damages, and on this question they are, as third parties, already entitled to be heard.

The real desire of the third parties, as plainly appears from the affidavit of Simoni, is to assert a counterclaim, not in relation to the 1,000 cases of oranges which were shipped, and which form the subject of the plaintiffs' claim, but in relation to the remaining 6,000 cases, which were not shipped, and in respect of which it is alleged that the plaintiffs were in breach of their contract. It is true that, according to Simoni's affidavit, the 6,000 cases that were not shipped were the subject-matter of

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¹¹ [1895] 2 Q.B. 321.

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the same contract under which it is alleged that the 1,000 cases, the subject of the plaintiffs' claim, were purchased. But otherwise there is no connexion between the 6,000 cases, the subject-matter of the proposed counterclaim, and the 1,000 cases, the subject-matter of the plaintiffs' claim. The issue as to whether the plaintiffs were in breach of their contract in failing to ship the 6,000 cases, and whether, if so, the third parties are entitled to recover the alleged or any damages for such breach of contract, does not depend upon any question as to the passing of the property in any of the oranges. Assuming that the third parties are able to make good their allegation that the plaintiffs were in breach of their contract in failing to ship the further 6,000 cases, the decision of that question will not in any way affect the issue as to whether the property in the 1,000 cases actually shipped passed to the third parties, or whether the assertion of the plaintiffs' claim affects the third parties in the enjoyment of their legal rights in relation to the subject-matter of that claim. The determination of the issue as to the plaintiffs' right to sue in respect of these 1,000 cases remains quite unaffected by the success or failure of the third parties' proposed counterclaim. So far as the proposed counterclaim is concerned, therefore, this is an entirely different case from *Montgomery v. Foy, Morgan & Co.*,¹¹ in which the proposed counterclaim did in fact relate to the same subject-matter as the plaintiffs' claim.

In these circumstances I am unable to see how the adding of these third parties as defendants, so as to enable them to put forward their proposed counterclaim, is necessary so as to enable them to protect their legal rights in relation to the subject-matter of the plaintiffs' claim. Nor is it necessary so as to enable the court to adjudicate upon and settle the questions involved in the cause or matter, which, as pointed out by Devlin J. in *Amon v. Raphael Tuck & Sons Ltd.*,¹² means "the action as it stands "between the existing parties."

In these circumstances, in my judgment, the third parties' application to be added as defendants must fail, because it is not shown that the cause or matter—i.e., the dispute arising in relation to the plaintiffs' claim—is liable to be defeated by the non-joinder of the third parties as defendants, nor is it shown to my satisfaction that the third parties are persons who ought to have been joined as defendants in the first instance, or that their

¹¹ [1895] 2 Q.B. 321.

¹² [1956] 1 Q.B. 357, 369.

presence before the court, as defendants, is necessary to enable the court effectually and completely to adjudicate upon and settle all questions involved in the cause or matter, within the meaning of the rule. I do not think that upon any view it can be said that the third parties are persons who ought to have been joined as defendants in the first instance. On this point I agree with Mr. Brandon's submission that the test is whether, under the old practice, a plea in abatement would lie. It is not to be forgotten that the remedy sought by the plaintiffs is a remedy in rem against the ship. This is a remedy which *prima facie* they are entitled to pursue, and I do not think it can be said that the action is not properly constituted because it is brought only in rem against the ship.

It may be thought that this result produces the maximum of inconvenience—that it would be sensible and reasonable, and would save unnecessary costs, if the third parties could be added as defendants, so that all the questions in issue between the parties can be dealt with at one and the same time. It is possible, of course, that the third parties will be able to achieve this result in another way, e.g., by starting a fresh action against the plaintiffs and applying to consolidate, or at least to have the actions tried together. As to this I say nothing. I am dealing with this matter as a question of jurisdiction. Jurisdiction depends on the terms of the rule, and not upon what I may or may not think would be a convenient course in all the circumstances. For the reasons which I have endeavoured to state, I hold that the third parties' application is not within the rule, and that accordingly there is no jurisdiction to make the order asked for.

The appeal will therefore be allowed, and the order made by the registrar set aside.

Appeal allowed.

Solicitors: *William A. Crump & Son; Roche, Son & Neale.*

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Willmer J.

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HILLIER v. HILLIER AND LATHAM.

1958
April 24.Hodson,
Romer and
Sellers L.JJ.

Husband and Wife—Divorce—Expedition—Exceptional hardship—Subjective approach in exercise of court's discretion—Pregnancy of wife by adultery—Matrimonial Causes Act, 1950 (14 Geo. 6, c. 25), s. 2 (1), (2) and (3).

The parties were married in March, 1956. Eight months afterwards the wife left the husband and never returned to him. Three months later she went for treatment into a rehabilitation centre where she met a man with whom she committed adultery and was now living. As a result, as it was agreed between the parties, she became pregnant and the birth of the child was expected on about May 5, 1958. The husband, a man of nervous temperament, suffered a nervous breakdown which seriously affected his work and prospect of promotion. Having been advised by his doctor that a continuance of the worry and distress caused by his domestic troubles would inevitably result in further serious deterioration of health, he applied under section 2 of Matrimonial Causes Act, 1950,¹ for leave to present a petition for divorce within the three years of marriage on the ground of exceptional hardship:—

Held, (1) that regard should not be had to the interest of the expected child, since it was agreed that it would not be a child of the marriage.

(2) That the fact of pregnancy might be taken into account as an element in the case which would cause the husband to be distressed.

(3) That, in exercising its discretion under the Act, the court should approach each case subjectively. If the applicant should be found to be a person of a particularly nervous or highly-strung disposition, and further delay might have a serious effect upon him, then it could fairly be held that it would be exceptional hardship on the applicant to hold up his petition for the full three years; especially if, as in the present case, it is possible to couple it with the applicant's experiences in the past.

Decision of Wrangham J. reversed.

¹ Matrimonial Causes Act, 1950, s. 2 (1): "No petition for divorce shall be presented to the court unless at the date of the presentation of the petition three years have passed since the date of the marriage: Provided that a judge of the court may, upon application being made to him in accordance with rules of court, allow a petition to be presented before three years have passed on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent, . . ."

Subs. (2): "In determining any

"application under this section for leave to present a petition before the expiration of three years from the date of the marriage, the judge shall have regard to the interests of any children of the marriage and to the question whether there is reasonable probability of a reconciliation between the parties before the expiration of the said three years."

Subs. (3): "Nothing in this section shall be deemed to prohibit the presentation of a petition based upon matters which have occurred before the expiration of three years from the date of the marriage."

APPEAL from Wrangham J.

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The parties, Maurice Frederick Hillier and Janet Irene Hillier, were married on March 24, 1956, and in November, 1956, the wife left her husband and never returned to him, though she vacillated in her intentions whether or not to return. The husband, a man very highly-strung, worried to such an extent that he suffered a nervous breakdown which seriously affected his work and prospect of promotion. In February, 1957, the wife was admitted as an inmate for treatment to a rehabilitation centre in Sussex. There she made the acquaintance of Latham, with whom she subsequently committed adultery. As a result she became pregnant and the birth of the child had been medically fixed as May 5, 1958. In the above circumstances the husband, having been advised by his doctor that a continuance of the worry and distress caused to the husband by his domestic troubles would inevitably result in further serious deterioration of health, made application for leave to present a petition for divorce within the three years of marriage required by section 2 (1) of the Matrimonial Causes Act, 1950, on the ground that exceptional hardship would be suffered by him if the petition was further delayed. The application was not granted by the divorce judge and the husband appealed.

On April 22 the Court of Appeal accelerated the hearing of the appeal, it having been pointed out that if the petition succeeded the respondent and co-respondent would be able to marry before May 5 and the child would then be legitimate.

Johnathan Sofer for the husband. There are four ingredients which make this case one of exceptional hardship for the husband petitioner: (1) Desertion by the wife so soon after the marriage. (2) The suffering in health by the husband through worrying whether the wife was or was not returning to him. (3) The vacillation of the wife. (4) The fact that the wife is now known to be pregnant by another man.

Fifthly, the wife is going to have a child by the man with whom she has committed adultery, and that child is expected to be born on May 5. Section 2 (2) of the Act requires that the judge considering an application of this nature should have regard to the interests of any "children of the marriage." The child to be born on May 5 will certainly be "the child of the marriage" for the purposes of the court's consideration until the husband has bastardized it by giving evidence in court on his petition.

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[HODSON L.J. But we know that it is not a child of the marriage. It is a most extraordinary situation, for if you consider it a child of the marriage, then, in the interests of the child, the situation should, in view of possible inheritance, remain as it is. But I think one must look at the realities.]

In *Bowman v. Bowman*² Denning L.J., giving instances of "exceptional hardship," included that in which a wife as a result of her adultery had a child by another man, so that the husband, if he took her back, would have to maintain another man's child.

There is no possibility of reconciliation and the appeal discloses, by evidence which was not before the judge below, that the husband has been advised by his doctor that a continuance of the distress and worry caused by his domestic troubles will inevitably cause further and very serious deterioration of the husband's health. The judge below said that the husband's sickness was not connected with the wife's adultery. That was clearly a misunderstanding and misdirection as to what effect should be given to the wife's conduct. The Court of Appeal is entitled to look at the matter *de novo* and consider the effect of the pregnancy on the husband's health. Having regard to the husband's health and the additional evidence, the court should hold that it is a case of exceptional hardship and the appeal should be allowed.

William Kee, for the wife, did not oppose the appeal. It is conceded that it is a case of exceptional hardship. There is clearly no prospect of reconciliation, and it would further the interests of public policy to allow the appeal.

HODSON L.J. This is an appeal by leave from an order of Wragham J. dated April 18, 1958. The reason for the acceleration of the appeal is that it is desired (and that is one of the objects of this application) to enable the respondent to a proposed divorce petition to marry the man, with whom she has committed adultery, before May 5, that being the date when she expects to be confined as a result, as it seems and the man says, of that adultery. The actual matter before the court was and is an application for leave to present a petition for divorce within three years of the marriage, the marriage having taken place on March 24, 1956. The Matrimonial Causes Act, 1950, provides that no petition for divorce shall be presented within three years of the marriage, but there is a proviso to section 2 (1) that a judge may upon application allow a petition to be presented before

² [1949] P. 353; 65 T.L.R. 461; [1949] 2 All E.R. 127.

three years have passed, on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent. [His Lordship read section 2 (2) of the Act and continued:]

The judge dismissed this application, which was brought on the ground of exceptional hardship suffered by the petitioner in the circumstances of this case, which were that in November, 1956, within a comparatively few months of the marriage, his wife left him. She never returned to him, although she vacillated in her intention to return, and caused him great distress, leading up to something in the nature of a nervous breakdown on his part which caused him to be absent from his work for some time.

In February, 1957, the wife was admitted as an inmate of Roffey Park Rehabilitation Centre at Horsham in Sussex for treatment. At that time the relationship between the parties was not unfriendly; affectionate letters were exchanged, and the husband hoped that his wife would return to him. But in this centre she met the man concerned in this case with whom she has committed adultery and expressed herself to be in love. Since that time she has been adamant in her refusal to return to her husband, who subsequently learned that she was pregnant, and pregnant by this man, and a medical certificate was obtained which shows when the child is likely to be born. The fact that this adultery has resulted in pregnancy is an element which, no doubt, would satisfy the judge that the prospects of reconciliation were indeed remote, because it would make it more unlikely that the husband would take his wife back if she had a child by another man.

It is on the question of exceptional hardship that this appeal turns; and I would say at once that for my part I agree with what the judge said in regard to the fact of the pregnancy. I do not think it makes any difference whether the child is expected to be born, or whether the child has been born. In either case I would not think it right to lay down that that must necessarily be regarded as exceptional hardship to the husband, although, no doubt, it would be an element in the case (as it has been in this case) which would cause the husband to be distressed and afflicted by the injury which has been put upon him.

The reference in the section to the interests of children of the marriage does not seem to me to assist, because looking at the realities of this matter this child is agreed to be not a child of the marriage, and it is on both sides agreed that the child is in reality the child of the wife by this man Latham, with whom she has committed adultery. It is pointed out that if the child is

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born before Latham marries the respondent, as he says he intends to do, the child cannot be legitimated by subsequent marriage. But, of course, if the child is born when Latham and the woman are free to marry and do marry, the child will be regarded *prima facie* as the child of that marriage.

But there is an element in this case which I think the court is entitled to look at as showing that the husband has suffered exceptional hardship. The judge did pay some regard to the breakdown in health which the husband has suffered after November, 1956, when his wife left him, before she had actually met this other man: but he disregarded it, or paid little attention to it, because he thought it was scarcely relevant having regard to the fact that the man who has caused the trouble in this case did not come on the scene until afterwards. But in this court we have allowed further evidence to be given as to the suffering which the husband has had following upon, not only his wife leaving him, but her throwing in her lot with this other man; and from that further evidence it appears that he has suffered to a perhaps unusual extent from the nervous anxiety which this domestic situation has caused him. He has been unable to concentrate on his work—which is that of a supervising clerk—and he failed in his attempt to be accepted as a candidate for a departmental training scheme at a time when he was quite unable to concentrate on or do justice to his work. He has suffered, and is still suffering, from sleeplessness and anxiety caused by the domestic situation in which he finds himself, and he has consulted a medical man who has prescribed sedatives and advised him that, if he continues to worry, his health must inevitably suffer.

I think that the court is entitled to look at the effect on this particular husband of the situation which has developed in considering the question of exceptional hardship, and not merely to confine itself to an objective view as to how the ordinary man might be expected to react in given circumstances. I have said that I do not base my judgment on any question of the interests of the child, although reference was made to a passage in the judgment of Denning L.J. in *Bowman v. Bowman*¹ where, in giving instances in which he had himself exercised his discretion at first instance, the Lord Justice refers to the case of a wife as the result of adultery having a child by another man so that the husband, if he took her back, would have to maintain another man's child. That situation, of course, is not the situation which is contemplated in this case. Here, so far as the evidence goes,

¹ [1949] P. 353; 65 T.L.R. 461; [1949] 2 All E.R. 127.

there is no likelihood of the husband, if this application is rejected, being expected to take his wife back and legitimize the child. The facts of the case are that the other man and the wife are living together, and that it is not contemplated that the woman should return to her husband bringing the child with her. Therefore, the only real ground upon which I can see my way to saying that this is a case of exceptional hardship is the case which has been put forward in this court, and indeed supported by quite different evidence from that given in the court below, namely, a case in which exceptional hardship has been caused to the husband by reason of the suffering in his health which he has endured, and it is for those reasons that I would allow this appeal.

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ROMER L.J. I agree, and for the same reasons which my Lord has mentioned. The reasons for the view that this appeal should be allowed to my mind are founded principally on evidence which was not before the judge, consisting of a further affidavit of the husband. He relies on the exceptional hardship provision in section 2 of the Act of 1950—that the case is one of exceptional hardship suffered by the petitioner. Those words presumably include hardship suffered in the past by the would-be petitioner, but I think myself that they are directed to a considerable extent, if not primarily, to the possibility or probability of exceptional hardship being suffered in the future by the petitioner if he has to wait the full period of three years before he can present his petition, which in this case would be nearly one more year, the marriage having taken place in March, 1956.

The husband, as the evidence quite obviously shows, experienced in the past worry and strain to a degree which may fairly be described as exceptional, resulting as it did at the end of 1956, I think, in a nervous breakdown. That trouble was quite plainly brought about by his wife's treatment of him, her desertion and vacillation as to whether to return to him or not, her confession that she had a lover, and her later confession as to her pregnancy. All those elements, lasting as they did over quite a period of time, built up a position which resulted in the husband being subjected to and experiencing a very considerable degree of nervous tension.

That being the position in the past, we have now before us an affidavit which has been sworn since the matter was before the judge, in which the husband says that he has consulted his doctor, who advised him that if he continues to worry in the way he has been worrying in the past his health must inevitably suffer further; and that, of course, is highly relevant to what is, in my

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opinion, perhaps the primary purpose, or the position which was primarily envisaged by the section, namely, the effect that having to wait for the full three years would have upon the would-be petitioner; and in this case the position is that it would inevitably result in a further deterioration in his nervous condition.

I agree with my Lord that one should approach each case subjectively, and whatever the position might be in relation to what might in other connexions be described as the ordinary reasonable man, if one finds a man who is of a particularly nervous or highly-strung disposition, and further delay may have a serious effect upon him, then it may fairly be said of him that it would be exceptional hardship in his case to compel him to delay and hold up his petition for the full three years, especially if one couples it, as one does in this case, with his experiences in the past. In addition to all that, it is perfectly plain here that there is no prospect of reconciliation between these two parties, a matter to which Denning L.J. adverted in his judgment in *Bowman v. Bowman*¹ to which my Lord has referred.

For those reasons, based as they are on the husband's health and on nothing else, so far as I am concerned, I think that he has made out a case.

But in conclusion I would associate myself with what my Lord has said; and I agree with the judge in this: I cannot think that the mere fact that conception follows upon an act of adultery in the first three years of the marriage constitutes in itself exceptional hardship for the purpose of section 2 of the Act. I would allow the appeal.

SELLERS L.J. I so entirely agree with the reasons given by both my Lords that I desire to add none of my own.

Appeal allowed.

Solicitors: *H. E. Thomas & Co.; Webster, Butcher & Johnson.*

A. W. G.

¹ [1949] P. 353.

LEWIS v. LEWIS.

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1958
March 11.Hodson and
Pearce L.JJ.

Husband and Wife—Practice (in matrimonial causes)—Discretion statement—Admission of adultery in cross-examination—Whether questions on adultery objectionable—Leave to amend answer to allege adultery based on petitioner's admission in evidence—Whether party seeking exercise of court's discretion entitled to defer evidence of adultery until after decision on issue of cruelty—Proper practice—Matrimonial Causes Act, 1950 (14 Geo. 6, c. 25), s. 32 (3) — Matrimonial Causes Rules, 1957 (1957 No. 619 (L.4)), r. 28 (5).

Husband and Wife—Practice—Amendment to allege adultery—Discretion statement—Amendment after admission in evidence of adultery.

Evidence—Incriminating question—Adultery—Whether question as to adultery of witness incriminating—Matrimonial Causes Act, 1950, s. 32 (3).

Husband and Wife—Divorce—Evidence—Adultery—Whether question as to adultery of witness incriminating—Whether relevant to issue of cruelty—Matrimonial Causes Act, 1950, s. 32 (3).

A husband, who had parted from his wife in April, 1954, presented a petition for divorce on the ground of her alleged cruelty, and by his prayer asked for the court's discretion to be exercised in his favour notwithstanding his own adultery. By her answer the wife prayed for a divorce, charging her husband with cruelty, and her particulars included a charge of cruelty on an occasion when she had accused him of philandering with other women shortly before they separated.

At the hearing the husband did not give evidence of his own adultery during his examination-in-chief; but in cross-examination he was asked whether he had committed adultery, and replied "Yes." Despite objection being taken to that question, the commissioner allowed it to be put and also allowed a further question as to when the husband had committed adultery, to which he replied that it was after he had parted from his wife in April, 1954. A further question as to the person with whom the adultery had been committed was objected to and the commissioner upheld the objection. Leave was thereupon sought by the wife to amend her answer by adding a charge of adultery "on some day or days unknown, save "that it was after April, 1954, at a place or places unknown . . . "with a woman or women whose name or names are unknown." The commissioner granted the wife leave to amend, but gave leave to appeal from that decision, and adjourned his decision on the issues raised in the suit:—

Held, dismissing the appeal, (1) that the questions on adultery were not objectionable as incriminating and in this case were outside the statutory protection afforded by section 32 (3) of the Matrimonial Causes Act, 1950.¹

¹ Matrimonial Causes Act, 1950, s. 32 (3): "The parties to any proceedings instituted in consequence

"of adultery and the husbands and
"wives of the parties shall be competent to give evidence in the

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Blunt v. Park Lane Hotel Ltd. [1942] 2 K.B. 253; 58 T.L.R. 356; [1942] 2 All E.R. 187 applied.

(2) That the questions were not irrelevant to the issue of cruelty in view of the allegation of philandering in the wife's answer; accordingly they had rightly been admitted by the commissioner.

(3) That in those circumstances, there seemed to be no reason for objecting to the exercise of the discretion by the commissioner in giving leave to amend at that stage. Where there is no allegation of adultery in matrimonial proceedings, but only an indication in the prayer that discretion will be sought, and evidence of adultery is then given in the witness-box, leave to amend to allege adultery will not be given as of right; but it is convenient that such leave shall be given, provided that no injustice will thereby be done to the parties.

Clear v. Clear [1958] 1 W.L.R. 467; approving *Clueit v. Clueit* [1958] 1 W.L.R. 463; [1958] 1 All E.R. 417 applied.

(4) That the amendment charging adultery was not too vague, since it was based on an admission of adultery given in sworn evidence, and not merely on the contents of the prayer to the petition.

B. v. B. and G. [1937] P. 1; 52 T.L.R. 719; [1936] 2 All E.R. 1254 distinguished.

(5) That, as the fact of adultery was in this case relevant to the issue of cruelty, evidence of it ought to have been given by the petitioner in his evidence in its chronological place, for a court could not arrive at a finding on the issue of cruelty without having before it the evidence on adultery.

(6) There was no rule of practice entitling a petitioner in a matrimonial cause to defer giving evidence of his own adultery until the court had given judgment on the issues on the pleadings, particularly where cruelty was in issue; nor would such a practice be reasonable or desirable.

INTERLOCUTORY APPEAL by leave from Sir Harry Trusted, sitting as commissioner in divorce at Monmouth Assizes.

The parties were married in 1945. On March 14, 1957, the husband presented a petition for divorce on the ground of the wife's alleged cruelty. The acts of cruelty alleged included one, "that on an occasion about April 17, 1954, at about 8 p.m. at a public house in Aylesbury the respondent hit the petitioner across the face saying 'I've got all the evidence I want now.' " On June 12 the husband amended the prayer of his petition, pursuant to an order made on June 4, to include a prayer for the exercise of the discretion of the court in his favour, on the grounds of his own adultery.

"proceedings, but no witness in any such proceedings, whether a party thereto or not, shall be liable to be asked or be bound to answer any question tending to show that he

"or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery."

By her answer the wife denied the cruelty and herself alleged cruelty against her husband, asking for the dissolution of the marriage on that ground. In further and better particulars of the alleged cruelty she stated that "on a date in April, 1954, "when she accused him of philandering with other women, a "violent quarrel ensued, and he threatened to kill her if she did "not leave him alone." The wife did not in her answer charge her husband with adultery.

At the hearing on January 29, 1958, the petitioner gave evidence in support of his allegations of cruelty, but made no reference in his evidence-in-chief to his own adultery indicated in his discretion statement; and neither the statement nor any examination on its contents was put to him by his counsel; but in cross-examination by counsel for the wife he was asked whether he had committed adultery, and replied "Yes." His counsel objected that the question ought not to be asked or at least that it was a question which the petitioner could object to answer; but the commissioner ruled that it was admissible, and also allowed a further question as to the date of the admitted adultery, to which the husband replied that it had taken place after he had parted from his wife in April, 1954. A further question as to the person with whom the adultery had been committed was put, but counsel's objection to that question was upheld by the commissioner.

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At the close of his case, counsel for the husband declined to put the discretion statement in evidence and asked to be allowed to defer doing so until after the question of cruelty had been decided. The commissioner said that the point with which the court was concerned was when exactly the discretion statement should be put in. In his experience the discretion statement was always put in before the evidence was closed. As that had not been done, counsel for the wife had submitted that the petitioner had failed to make out a prima facie case.

The commissioner regarded the point as an entirely technical matter. The materiality of it was that in certain eventualities the petitioner might have to make a disclosure which the respondent would use to her benefit and ask for leave to amend in consequence. In the commissioner's view the petitioner ought to put in his discretion statement. The best thing would be for counsel for the wife to call his evidence.

The wife then gave evidence on the issue of cruelty. At the close of the wife's case, counsel for the wife asked for leave to amend her answer to include an allegation of adultery based

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solely on the sworn evidence of the husband given in the suit in the witness-box. The proposed amendment was in the following terms: "That the petitioner on some day or days unknown, save "that it was after April, 1954, at a place or places unknown, "committed adultery with a woman or women whose name or "names are unknown." There were minor and consequential amendments to the two following paragraphs.

The case was adjourned on January 30, 1958, in order that, on the pleadings as they then stood, with the amendment as allowed by the commissioner, counsel for the husband might have an opportunity of pleading to the charge of adultery. On the following day, January 31, an application was made to the commissioner for leave to appeal from his order allowing the amendment to the wife's answer, and leave was granted.

H. B. D. Grazebrook Q.C. and *W. R. K. Merrylees* for the husband. The admitted adultery was subsequent to the parting and was therefore not relevant to the issue of cruelty. A decision on that issue should have been given before the discretion statement was considered. That is the correct approach; a party asking for discretion is entitled to postpone giving evidence of his adultery until after the court has made its findings on the issues pleaded. The proper procedure in relation to discretion statements—now embodied in the Matrimonial Causes Rules, 1957, r. 28 (5)—was laid down by Lord Merrivale P. in *Apted v. Apted and Bliss*,² and the rule later formulated was set out in the note to *Bevis v. Bevis*.³

[HODSON L.J. All this is mere machinery. I have from time to time protested against the phrase "put in a discretion "statement." If a party asks for discretion he must tell the court about his adultery. The court has to consider the evidence and not a mere piece of paper. The only object of reading the statement is to hush up the name of another person or to say as little as possible about the party's own adultery.]

But the party putting it forward need not do so until the main issue has been dealt with.

[PEARCE L.J. In my experience it has only been tried once, and I then told the party seeking to take that course that he must go to the Court of Appeal, for in my view it was useless to try a case of cruelty without knowing the matrimonial conduct which might have a bearing on it.]

² [1930] P. 246; 46 T.L.R. 456.

³ [1935] P. 86. 99n.; 51 T.L.R. 291n.

That might be the position in cases where the subject-matter of the petition and the discretion statement were so mixed up that they should not be separated. [*Burford v. Burford*⁴ was referred to.]

Secondly, the amendment should not be allowed, for it is not and cannot be particularized. In *B. v. B. and G.*,⁵ where there was no evidence of adultery but only an indication in the prayer that discretion would be sought, Langton J. refused to allow a cross-prayer to allege adultery on the ground of want of particularity. The admission of adultery here in the witness-box amounts to very little more than could have been given by way of particulars in the cross-prayer refused in *B. v. B. and G.*⁵

Thirdly, the question in cross-examination about adultery ought not to have been allowed, or, alternatively, need not have been answered, for it was (a) incriminating; (b) within the statutory protection afforded by section 32 (3) of the Matrimonial Causes Act, 1950—since after the amendment these proceedings became “proceedings instituted in consequence of adultery”; and (c) irrelevant to the issue of cruelty, unless it could be said to go to credit. It is conceded that *M. (orser. D.) v. D.*,⁶ per Sir James Hannen P., and *Sims v. Sims*⁷ are authorities against ground (a) of this submission; but see *S. (orser. G.) v. S.*,⁸ in which Bargarve-Deane J. did not follow Sir James Hannen P. and held a question to be inadmissible; and in *Cavendish v. Cavendish*⁹ Lord Merrivale P. referred to the principle enunciated by Bowen L.J. in *Redfern v. Redfern*¹⁰ that a party could not be compelled to discover that which, if answered, would tend to subject him to any punishment, penalty, forfeiture or ecclesiastical censure.

[HODSON L.J. That has gone since *Blunt v. Park Lane Hotel Ltd.*¹¹ decided that the privilege of not answering such questions as being incriminating had become obsolete.]

[PEARCE L.J. In any event incriminating questions can always be asked but need not be answered.]

[*Neil McKinnon Q.C.*, for the wife, intervening. The question cannot be said to be irrelevant in view of the pleading that the wife had accused her husband of philandering with other women.]

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⁴ [1955] 1 W.L.R. 1242; [1955]

3 All E.R. 664.

⁵ [1937] P. 1; 52 T.L.R. 719;

[1936] 2 All E.R. 1254.

⁶ (1885) 10 P.D. 175, 176.⁷ [1949] W.N. 208.⁸ [1907] P. 224; 23 T.L.R. 460.⁹ [1926] P. 10, 12-13; 42 T.L.R.

134.

¹⁰ [1891] P. 139, 147.¹¹ [1942] 2 K.B. 253; 58 T.L.R.

356; [1942] 2 All E.R. 187.

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That is a particular of cruelty and not an accusation of adultery.

Fourthly, though the court has a discretion to allow an amendment, this was a wrong exercise of that discretion. In *Edevain v. Cohen*¹² leave to amend was sought, after all the evidence had been taken, by pleading the judgment in another case; it was refused, and the Court of Appeal held that North J. had rightly refused leave to amend at such a late stage. Cotton L.J.¹³ said that the amendment did not seem to bring out the real question between the parties.

[HOBSON L.J. I suppose the real question here is whether either of the parties should have a divorce?]

No; it is whether either has been guilty of cruelty.

[HOBSON L.J. That is the more limited aspect of it.]

Neil McKinnon Q.C. and *P. G. Langdon-Davies* for the wife. The commissioner correctly approached the question of adultery in this case. The practice by which the contents of a discretion statement are kept out of the evidence until the close of the case and then put in, thus depriving the other party of the right to cross-examine, is a wrong practice which should not be supported. If pursued, it might result in a finding on the issues pleaded, particularly where cruelty is an issue, based on an entirely wrong picture of the marriage.

On the objection that the question on adultery is incriminating, *Goddard L.J.* said in *Blunt v. Park Lane Hotel Ltd.*¹⁴ that that view was obsolete even at the time when *Redfern v. Redfern*¹⁵ was decided. On its relevance or its admissibility as going to credit, it is difficult, if not impossible, in a case like the present, where a man is giving evidence that his wife has been cruel to him, to separate relevance and credit. The fact that he is putting forward a story of cruelty as against an innocent man when he is not in fact innocent goes to credit; and the fact that he puts himself forward as an innocent man goes to relevance, for his wife was not then being cruel to him when she accused him of philandering with other women.

In the present case the question is also relevant, for in a matrimonial cause the answer may throw a different light on the behaviour and attitude to life of the witness.

On the issue as to generality, the object of particularizing is to put the other party on notice. An allegation that "he has committed adultery on divers occasions" would be bad for

¹² (1889) 43 Ch.D. 187.

¹³ Ibid. 190.

¹⁴ [1942] 2 K.B. 253, 255, 257.

¹⁵ [1891] P. 139.

generality. But here the petitioner has admitted adultery in the witness-box and only failed to particularize because his counsel objected to the questions. The commissioner rightly said that he would have to say it all sooner or later. Therefore the ordinary objection to vagueness does not apply here, because the petitioner knows what he has to meet, and if his petition failed and the wife later presented a petition, she could rely on evidence given in former proceedings, so that her allegation of adultery would not be struck out. *B. v. B. and G.*¹⁶ is distinguishable.

Grazebrook Q.C. in reply. It is not suggested that in all cases the matter of adultery should be left until after findings have been made on the issues pleaded, but only that if counsel elects to take that course it can be taken and has been taken often.

HODSON L.J. stated the facts set out above and continued: The objection taken to the amendment is on a variety of grounds. First, as to whether the question was properly asked—which no doubt goes to the root of the matter—the objection that the question was an incriminating question is unsound. The ecclesiastical penalties which may be involved in cases where persons commit adultery have been held by the court not to be, at the present time, such as to carry with them the protection of witnesses which they are able to claim in order to avoid incriminating questions. It is unnecessary to do more than refer to the decision of the Court of Appeal in *Blunt v. Park Lane Hotel Ltd.*,¹ where reliance was placed on some observations in the judgment of Bowen L.J. in a divorce case, *Redfern v. Redfern*,² as showing that the peril of ecclesiastical punishment was still a live peril against which witnesses were entitled to claim protection. But that view was held to be obsolete, and it was pointed out that the decision in *Redfern v. Redfern*² was based on the particular provisions of the statute which prevented, in proceedings instituted in consequence of adultery, questions being asked tending to show that a witness had committed adultery. The relevant statute at the present time—later than the statute under consideration in *Redfern's* case²—is the Matrimonial Causes Act, 1950, s. 32 (3): “The parties to any “proceedings instituted in consequence of adultery and the “husbands and wives of the parties shall be competent to give

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¹⁶ [1937] P. 1.² [1891] P. 139; 7 T.L.R. 157.
¹ [1942] 2 K.B. 253, 256; 58
T.L.R. 356; [1942] 2 All E.R. 187.

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“evidence in the proceedings, but no witness in any such proceedings, whether a party thereto or not, shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery.” These proceedings not having been instituted in consequence of adultery but in consequence of cruelty, that express statutory provision does not apply and does not become applicable now that the amendment has taken place. The answer was given in the witness-box when the proceedings were proceedings for cruelty.

If it be objected to the question that, whether incriminating or not, it could not be asked because it was irrelevant to the issue—which was an issue of cruelty on both sides—the answer is to be found in the pleadings. The charge of adultery relates to April, 1954. In paragraph 14 of the petition the husband said that on April 17, 1954, at a public house in Aylesbury, the wife hit him across the face saying: “I have got all the evidence I want now.” That may not be a very pointed reference to evidence of adultery, but in the particulars of the answer, relating also to April, 1954 (which, of course, may or may not relate to the same incident), the wife says that she accused him of philandering with other women, that violent quarrelling ensued, and that he threatened to kill her if she did not leave him alone.

So that the question whether or not this man was philandering or committing adultery with other women is closely connected with the issue of cruelty which it was for the court to decide on the pleadings as they originally stood. It is unnecessary to go further and consider whether, in any event, the question might have been permissible as tending to go to shake the credit of the husband, to whom the question as to adultery was addressed. So far as the evidence was concerned, in my judgment it was rightly admitted by the commissioner.

If that is so, there seems to me to be no reason at all to object to the exercise of the discretion by the commissioner in giving leave to amend at that stage. Whether an adjournment was necessary or not, I do not know. It seems unlikely that the husband, having given evidence of his adultery in that way, would get much help from some such defence as an allegation of “conduct conducing,” although, no doubt, such a defence would be open to him. But there was no objection to the amendment

being made. The court has said recently in *Clear v. Clear*,³ that where, in suits for divorce, a husband or wife has given evidence in the witness-box of his or her adultery following on no allegation of adultery, but only a prayer indicating that discretion would be sought, it does not follow as of right that leave to amend will be given—although I think it is generally more convenient that such leave should be given provided that no injustice to the parties will be done. If leave is not given, it may well be that the charges of cruelty will fail, as so often happens, and fresh proceedings can at once be brought by the wife or the opposite party based on the admissions made in the witness-box. We referred in *Clear v. Clear*³ to a decision of Davies J. in *Clueit v. Clueit*,⁴ where leave to amend was given in similar circumstances; this court agreed with the course taken by Davies J. in *Clueit's* case,⁴ and with the reasons which he gave.

So far as the form of the amendment is concerned, it has been argued that the paragraph which I read out was too vague to stand by itself and could be struck out, and, therefore, that leave to amend ought not to be given. Reliance was placed in support of that contention on *B. v. B. and G.*,⁵ a decision of Langton J., where a respondent to a divorce petition sought leave to amend his answer by putting in a charge of adultery based only on the notice contained in the prayer that discretion was being sought. It was argued that, as the inevitable inference was that discretion was being sought in respect of adultery, leave to amend should be given. But leave was refused; and that decision has stood for a very long time.

It has been recognized that according to the practice of the court the prayer of a petition cannot properly be treated as an admission. Indeed, the practice is now regulated by rules, to which I shall refer, which prevent the other party against whom discretion is being sought ascertaining the facts from any document before the court before the hearing; so that no evidence is given relating to the adultery until the party seeking discretion goes into the witness-box. The rule is rule 28 (5) of the Matrimonial Causes Rules, 1957, which deals with what are called "discretion statements," in which a party has to set out on paper before the hearing details of his or her adultery. Sub-rule (5) reads: "Neither the fact that a discretion statement "has been lodged or that such notice as aforesaid has been given

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³ [1958] 1 W.L.R. 467.⁵ [1937] P. 1; 52 T.L.R. 719;⁴ [1958] 1 W.L.R. 463; [1958] [1936] 2 All E.R. 1254.

1 All E.R. 417.

C. A. " nor the contents of the discretion statement or notice shall be
1958 " given as evidence against the party lodging or giving the same
LEWIS " in any matrimonial cause or matter except when that party has
v. " put the discretion statement or notice or the contents thereof
LEWIS. " in evidence in open court." It follows from that that what is
Hodson L.J. contemplated is that before the court can deal with the matter
the party seeking discretion must give evidence which includes
evidence of his or her own adultery.

I do not think that there is any substance in the objection that the allegation in the amended answer based on the husband's evidence is too general. He has given his evidence in open court, stating on oath that he committed adultery following upon the parting with his wife in April, 1954. He did not get as far as giving further details of that because he was stopped, for reasons into which I need not go. Without casting any doubt whatever on the decision of Langton J. in *B. v. B. and G.*,⁵ I do not think it would be sensible to exclude this pleading, based as it is on the husband's sworn statement, on the ground that that sworn statement is not sufficiently specific.

The contention was below and is here that the duty of the court, where discretion is asked for, is to deal with the issues raised by the pleadings and dispose of them by findings before considering the question of discretion. I confess that I cannot lend any support to the contention that that is a practice which, if it ever has been followed, ought to be followed. It is quite true that the judge who has the conduct of the trial is entitled to be master in his own court, and if he finds it convenient, for good reasons, to take a particular issue separately, it may well be that no injustice will be done; but in a matrimonial cause where charges of cruelty are made (as here), and the fact of adultery is a relevant matter, and must be a relevant matter, it seems to me that it would be absurd to ask the judge to arrive at any decision on the cruelty without taking into account the fact of the adultery of the other party. It may be that in some cases the adultery of one spouse may be segregated, but certainly not in this case, where the wife's suspicions of adultery were (according to the pleadings, at any rate; we have not examined the evidence) aroused before the parting; and, indeed, she claimed to have evidence. How it can be expected that a judge shall arrive at a decision on the issue of cruelty without investigating that matter, I fail to see. Unkindness, abuse, even blows, may wear a very different colour when they are found to have come about because

⁵ [1937] P. 1.

of quarrels arising between spouses where accusations of adultery, true or false, have been made.

For my part, in the ordinary case it seems to me to be convenient that, where discretion is sought, whether the suit be defended or undefended, in examination-in-chief the petitioner should be asked to deal with the fact of his or her adultery in the place in which that fact chronologically appears. If, for example, the adultery had taken place immediately after the marriage it should be dealt with then in evidence; and I deprecate the practice which seems to have been adopted in some cases of dealing with the whole case as pleaded and then suddenly, as if by way of afterthought, producing a document which bears the dignified name of "discretion statement," handing it to the witness saying: "Is that all right?," hoping the witness will say: "Yes," and leaving it at that. The adultery which is referred to in that statement is part of the human story which the court has to investigate, and there is no magic in the discretion statement itself: that is a document which is provided for by the rules in order that these matters may be given proper consideration, and that the court may have the material before the hearing, although the parties have not access to it as of right. But the matter with which the court is concerned at the end of it all is the evidence given by the parties and nothing else—not the so-called "discretion statement" any more than the petition or the answer. It is the evidence which has to be dealt with.

The course which the counsel for the husband sought to induce the commissioner to follow was, I think, rightly resisted by the commissioner, who found himself very unwilling to treat these matters in separate compartments. In my judgment, there is no substance in the contention that leave to amend was wrongly given; and this appeal should be dismissed.

PEARCE L.J. I agree with all that my Lord has said. In my opinion, there is no rule of practice entitling a petitioner to defer giving evidence of his own adultery until the judge has given judgment on the issues on the pleadings; nor would such a practice be reasonable or desirable. It would seem a strange thing if a party could compel a judge to decide issues while deliberately withholding from him evidence which might throw a strong light on those issues—evidence which would be told to him as soon as it had become too late for him to use it. In many cases it is very difficult to arrive at true findings of cruelty or desertion without knowing whether at all relevant times one or other of

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the parties was committing, or had committed, or was about to commit, adultery. Even concealed adultery is likely to have a serious effect on the relations between husband and wife. Whether wholly unknown, or partially suspected, it may alter the whole atmosphere of a home. It is important that such a matter should be fully known to the judge when he is deciding the issues between the parties, and it would be wrong to allow one of the parties to deprive him of that knowledge.

Appeal dismissed.

Solicitors: *W. H. Matthews & Co.; Seeley & Co. for L. C. Thomas & Son, Neath, Glam.*

M. M. H.

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Sachs J.

PONTICELLI v. PONTICELLI (ORSE. GIGLIO)
(BY HER GUARDIAN).

Husband and Wife—Marriage—Validity—Proxy marriage—Husband domiciled in England—Home to be in England—Recognition of marriage ceremony in Italy.

Husband and Wife—Nullity—Conflict of jurisdiction—Wilful refusal—Marriage abroad—Law applicable.

Conflict of Laws.

An Italian domiciled and resident in England married by proxy in accordance with Italian law while he personally was in England a girl at that time resident and domiciled in Italy. The country of the intended matrimonial home was England. The husband presented a petition for nullity of marriage on the ground that the wife had wilfully refused to consummate it. The question accordingly arose which law was applicable upon the husband's plea if the proxy marriage itself were recognized in this country as a valid ceremony:—

Held, (1) that the court would recognize the proxy marriage.

Apt v. Apt [1948] P. 83; 63 T.L.R. 618; [1947] 2 All E.R. 677 applied.

(2) That the appropriate law to apply was not the *lex loci celebrationis* but English law, which was the *lex domicilii* and the *lex fori* (and, also, the law of intended matrimonial home).

Way v. Way [1950] P. 71; 65 T.L.R. 707; [1949] 2 All E.R. 959 followed.

Robert (orse. de la Mare) v. Robert [1947] P. 164; 63 T.L.R. 343; [1947] 2 All E.R. 22 not followed.

(3) That there was no distinction to be drawn in such cases between proceedings for wilful refusal to consummate and incapacity.

Dictum of Denning L.J. in *Ramsay-Fairfax* (or *se. Scott-Gibson*) v. *Ramsay-Fairfax* [1956] P. 115, 133; [1955] 3 All E.R. 695 followed.

Per curiam: If it were necessary to decide between the *lex domicilii* and the *lex fori*, it is to be urged in support of the *lex domicilii* that it would be unfortunate indeed if a marriage were held valid or invalid according to the country in which the matter was adjudicated; the danger is all the more to be feared by reason of the provisions of section 18 of the Matrimonial Causes Act, 1950. It is a matter of some importance that the initial validity of a marriage should in relation to all matters except form and ceremony (to which a uniform general rule applies) be consistently decided according to the law of one country alone.

De Reneville v. De Reneville [1948] P. 100; 64 T.L.R. 82; [1948] 1 All E.R. 56 considered.

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PETITION by husband for a decree of nullity on the ground that the wife had wilfully refused to consummate the marriage.

Both the husband and the wife were born in Ostuni in the province of Brindisi in Italy. The former was stated to have been born in October 1927, and the latter in February 1937. Both remained at all material times Italian nationals. In 1952, however, the husband came to this country where he considered that there were prospects of earning a better livelihood. He settled in this country and it was stated that he intended shortly to apply for naturalization. He had only been back to Italy once since 1952, namely, on a visit to Ostuni at Eastertide, 1955. One of his objectives on that occasion was to seek a wife. During his stay in Italy of a few weeks, the girl who became his wife, then aged 18, was presented to him by her parents, at the instance of his aunt, in case she should be found suitable for matrimony. After a few visits to see her at her parents' home an engagement was effected. Neither of the parties had spoken to each other in the absence of their elders before the betrothal took place, and the true negotiators appeared to have been the respective families. It was arranged that whilst the husband was still in Italy matters should be put in hand with a view to a marriage by proxy taking place, and the preliminary steps were taken accordingly: the husband returned to England where he signed certain documents, including a power of attorney. The ceremony took place in Italy by proxy on July 11, 1955, while the husband was in England, where it was planned that they should make their home.

The wife remained in Italy for the rest of July, for August and September. On October 26, 1955, she arrived in England and appears to have reached Paddington without having given her

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husband notice of the date or time of her arrival. He had by then secured accommodation in Bedford. She considered that she had been forced by her relatives into the marriage and it seems that by the time her husband met her at Paddington any disposition on her part to carry out further the wishes of her relatives had evaporated. She gave the husband nothing in the form of a greeting, though he tried to embrace her. On the way from Paddington to King's Cross it did not take much to start some minor quarrel, and by the time they reached the train for Bedford the wife was manifesting a firm intention to go back to Italy. She refused to go to Bedford, so it became necessary, as there was no accommodation available readily for her in London, to repair to the police station at King's Cross, where she introduced herself to the police sergeant by her maiden name and made clear her intention not to stay in this country. No doubt both spouses by then were irritated and excited. In the next few days, first at the Italian Consulate and next at the convent to which she was taken, the husband on his side made it clear that he wanted her to come to Bedford and the wife, on her side, made clear her determination on three points: first, she did not want him as a husband; secondly, she considered that she had been forced into the marriage by her relatives and, thirdly, she was going back to Italy.

By his petition dated November 12, 1956, the husband sought a decree of nullity on the ground of the wife's wilful refusal to consummate the marriage. The wife, as an infant, was represented by the Official Solicitor as guardian ad litem, and by her answer put in issue the validity of the marriage by proxy, but alleged that if the ceremony were found valid, then the marriage was a valid and subsisting one. (The validity of the marriage was not, however, disputed on her behalf at the hearing.)

Roger Ormrod and Holroyd Pearce (James Comyn with them) for the Official Solicitor, as guardian ad litem to the wife, submitted that upon the evidence the court should not find a wilful refusal by the wife to consummate the marriage because of her failure to attend the hearing in person. [Upon the question which law was applicable in deciding the issue of nullity reference was made to *De Reneville v. De Reneville*.¹] It is submitted that when considering an allegation that a marriage is void for a defect of form or capacity the court can look into the foreign law. So far as form is concerned, the governing law

¹ [1948] P. 100; 64 T.L.R. 82; [1948] 1 All E.R. 56.

is the *lex loci celebrationis*, although it is not now exclusively so in view of the decisions in *Taczanowska (orse. Roth) v. Taczanowski*² and *Kochanski v. Kochanska*.³ *De Reneville v. De Reneville*⁴ was, however, a case in which jurisdiction was in issue rather than a consideration of the law to be applied once jurisdiction was established.

If the court has jurisdiction in a case where a marriage is alleged to be voidable, the law applicable should be the *lex fori* rather than the *lex domicilii* should there be a conflict between the two. In such cases the English court can only pronounce a decree of nullity on the statutory grounds in section 8 of the Matrimonial Causes Act, 1950, or under section 21 of the Supreme Court of Judicature (Consolidation) Act, 1925.

The only direct decision on the question which law is to be applied in such cases is *Robert (orse. de la Mare) v. Robert*.⁵ It is submitted that that decision should not be followed, for if the *lex loci* were the law applicable it might, for example, result in our having to apply the Nazi anti-Jewish laws of marriage. The only way in which the English court could assume jurisdiction to apply foreign law in such a case would be if the ecclesiastical courts had done so before 1857.

The *lex fori* should prevail unless there is a question of some personal incapacity to marry or some other consideration apart from form for which one would look to the law of the domicile. But although it is submitted that sexual incapacity should be regarded as a matter of "personal incapacity" within the meaning of the words as used in *Sottomayor (orse. De Barros) v. De Barros*,⁶ if the marriage is claimed voidable, and not void, the *lex fori* and not the *lex domicilii* should prevail. [Reference was made to *Brook v. Brook and Attorney-General*,⁷ *Taczanowska (orse. Roth) v. Taczanowski*,⁸ and to Dicey on Conflict of Laws, 6th ed., p. 267.]

George Dobry for the husband. The validity of the proxy marriage as to form is governed by Italian law (*Apt v. Apt*),⁹ and on the expert evidence the marriage ceremony should accordingly be held to have been a valid one.

² [1957] P. 301; [1957] 2 All E.R. 563.

³ [1958] P. 147; [1957] 3 All E.R. 142.

⁴ [1948] P. 100.

⁵ [1947] P. 164; 63 T.L.R. 343; [1947] 2 All E.R. 22.

⁶ (1877) 3 P.D. 1.

⁷ (1861) 9 H.L.C. 193.

⁸ [1957] P. 301.

⁹ [1948] P. 83; 63 T.L.R. 618; [1947] 2 All E.R. 677; affg. [1947] P. 127; 63 T.L.R. 223; [1947] 1 All E.R. 620.

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[SACHS J. How do you deal with the suggestion by Lord Merriman P. in *Apt v. Apt*¹⁰ that the problem of recognizing proxy marriages was one which might have to be sub-divided into various categories?]

It is accepted that the circumstances here are different from those in *Apt v. Apt*,¹⁰ for the husband here is domiciled in England and England is the country of the intended matrimonial home, whereas in *Apt v. Apt*¹⁰ the domicile and intended home were both in the Argentine. But there is no ground of public policy to justify a different finding in this case whereby the marriage would be held invalid, and if there are to be exceptions to the rule recognizing proxy marriages they should be made by statute. It is submitted that the combined effect of Lord Merriman P.'s judgment and those in the Court of Appeal is that there should be no exceptions in the absence of express legislation.

If the validity of the ceremony itself is accepted, there are two alternatives only in the present case in deciding which law is to be applied to the nullity issue, namely, English or Italian law. English law would be applicable if the appropriate law were that of the domicile either at the time of the marriage or of the presentation of the petition, or if it were that of the country of the intended matrimonial home; Italian law would be applicable if the *lex loci* were appropriate. It is submitted that *Robert (orse. de la Mare) v. Robert*¹¹ ought not to be followed, and indeed it is to some extent obiter, since it was not necessary on the facts to distinguish between the *lex loci* and the *lex domicilii*. See also Dicey's *Conflict of Laws*, 6th ed., rule 36 (2), at p. 259, and note 91, criticizing *Robert (orse. de la Mare) v. Robert*.¹¹ That case is, moreover, inconsistent with Hodson J.'s decision in *Way v. Way*,¹² in which he applied the law of domicile—a view which he confirmed in his preface to Jackson's *Formation and Annulment of Marriage* (1951 ed.)—and with *De Reneville v. De Reneville*¹³: see the observations of Lord Greene M.R.¹⁴ and of Bucknill L.J.¹⁵

Should the court hold that the husband was domiciled in England when he presented his petition but not when he was married, it is submitted that wilful refusal affects the status of marriage *ex post facto*. The substance of the matter is that

¹⁰ [1947] P. 127, 141.

¹¹ [1947] P. 164.

¹² [1950] P. 71, 80; 65 T.L.R.
 707; [1949] 2 All E.R. 959.

¹³ [1948] P. 100.

¹⁴ *Ibid.* 114.

¹⁵ *Ibid.* 121–122.

someone is claiming to terminate an existing status, and in such case his right to do so should be referred to the law of the domicile at the date that he makes his claim, rather than earlier. Wilful refusal cases are to be distinguished from those in which incapacity is alleged.

Although there are dicta to the effect that the *lex fori* and not the *lex domicilii* is the relevant proper law in cases of wilful refusal, since English law is in this matter both the *lex fori* and the *lex domicilii* this need not be determined, although the choice of *lex fori* would seem to be more logical.

SACHS J. referred to the facts leading up to the proxy ceremony substantially as set out above, and of the marriage itself and said: It appears that the proxy marriage between these two took place in Italy whilst the husband was in England. I say "appears" to have taken place, because nobody who was there has been called to give evidence before me, and the only evidence that a marriage took place is that the certificate, to which I will refer later, was produced. [His Lordship referred to the contentions on the pleadings and continued:] The issues raised for decision in the course of the trial before this court were as follows: first, was there a valid marriage in Italy between this husband and wife on July 11, 1955; secondly, if the parties were thus validly married, then by the law of what country does the husband's plea fall to be decided, the *lex loci contractus*, the *lex domicilii* or the *lex fori*; thirdly, if the law in question is that of this country, has wilful refusal as alleged been established. A decision on these points has been rendered, if anything, a little more difficult by the absence of the wife. She being still an infant has, however, had the good fortune to be represented by the Official Solicitor and by Mr. Ormrod and Mr. Holroyd Pearce of counsel. She was given every opportunity to come to this country and attend this trial and it is unfortunate that she did not come, especially as she was offered the expenses of attendance.

Turning now to the validity of the marriage, the position is that by 1955 the husband had, in my view, become domiciled in this country. He was so domiciled when in 1955 in Ostuni the betrothal took place, and it was the basis of the arrangement between the parties that the matrimonial home should be in this country. By the evidence of Dr. Terni, an expert on Italian law, it appears that marriages by proxy as between parties resident in Italy are recognized as valid. It further appears that by

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article 111, subsection 2, of the Italian Civil Code, Book 1, a marriage by proxy can also take place when one of the spouses resides abroad and there are "serious reasons to be evaluated by " the General Attorney of the Italian court of the place where " the other spouse resides." It is to be noted that under the Code, wisely, the proxy must mention the name of the other spouse. It follows that the husband could, in 1955 in Italy, have executed a power of attorney validly authorizing a proxy marriage. It is also clear that, providing the appropriate formalities take place, such a proxy executed in this country would be valid for the purpose of a marriage in Italy.

The correct approach by the courts of this country to the issue whether a proxy marriage, such as the present, is valid, was clearly laid down by the Court of Appeal in *Apt v. Apt*,¹ the case of a proxy marriage in Argentina. Cohen L.J. delivered the judgment of the court and, after holding that it was not contrary to public policy here to recognize a marriage by proxy which has taken place outside this country, went on to say²: "we are unable to see any reason in public policy which would "require the English courts, if they recognize the validity of "proxy marriages celebrated outside the United Kingdom, to "deny to a person domiciled in this country the right of so "celebrating a marriage, provided, of course, that he or she has "in other respects capacity to marry and does not infringe any "provision of English law," and then: "We think it impossible "to hold that, in the absence of some statutory prohibition, it "is contrary to public policy to execute in England a power of "attorney which the same person could validly execute in the "Argentine, the power of attorney being intended to authorize "an act in the Argentine which is lawful by the law of that "country."

Those passages plainly cover the present proxy marriage in Italy, despite the fact that the husband was domiciled here. (There are here, it is to be noted, no facts which suggest that a power of attorney was used to effect a marriage which was not at the material moment voluntary on the part of the giver of the power.)

The only point which caused me some concern was the paucity of the evidence as to the marriage itself. Neither the power of attorney nor any copy of it was put in evidence. No testimony was given as to the contents or the effect of any document signed or executed by the husband, or as to any

¹ [1948] P. 83.² *Ibid.* 88.

"evaluation of serious reasons." The marriage certificate does not even reveal that the marriage was a proxy one, nor does it disclose whether the ceremony was religious, civil or of that mixed variety called a Concordat marriage. The totality of the evidence is that a marriage by proxy was arranged; that the husband signed a document for that purpose when he was in England on July 11, 1955; that the wife admits a proxy marriage took place; and that the marriage certificate in question is produced.

It seems to me, however, that in the above state of affairs the court should, in relation to that marriage certificate, which Dr. Terni said was acceptable by the courts of Italy when issued in regard to a proxy marriage, apply the presumption of *omnia rite esse acta*; and I hold that a valid marriage is shown to have taken place.

The next issue is, what law is applicable to the plea of nullity by reason of wilful refusal to consummate the marriage? The importance of that issue in the present case derives from the fact that such a refusal, if established, (a) is a ground on which a decree of nullity may be granted, according to the law of this country, under section 8 (1) of the Matrimonial Causes Act, 1950; (b) is not a ground for such a decree of nullity before a civil court in Italy; and (c) is not a ground for such a decree before a consistory court there, unless the intention to refuse to consummate the marriage existed at the moment of the ceremony itself.

I pause to note that on the evidence before me it is not clear whether in Italy it would be a civil or a consistory court which has jurisdiction over this particular marriage—but most probably it would be the latter.

As regards the authorities on the question of which law applies, I first refer to *Robert (or se. de la Mare) v. Robert*.³ In that case Barnard J. said⁴: "I have come to the conclusion " that I ought to apply the *lex loci celebrationis*, for the following " reasons. Wilful refusal to consummate a marriage, in order to " be justified on principle as a ground for annulment and not " dissolution, must be considered as a defect in marriage, an " error in the quality of the respondent "; considered that wilful refusal did not relate to the personal capacity of the respondent spouse and decided that the *lex domicilii* could not be applied.

In Rayden on Divorce, 7th ed. (1958), p. 93, the law is stated as follows: " Wilful refusal to consummate a marriage has been

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³ [1947] P. 164.⁴ Ibid. 167.

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“held in one case to be a defect in the marriage, so as to make
 “the *lex loci contractus* applicable, rather than as something
 “affecting capacity to contract.”

In *Way v. Way*,⁵ however, Hodson J. took a contrary view. That was the case which concerned the validity of four marriages by British members of military missions and other organizations concerned with the prosecution of the war when they were on duty in Russia during the period 1941 to 1945. In all four cases the main point put forward by the petitioners was that the marriages were void for want of form according to the law of the U.S.S.R., a plea rejected by Hodson J. Brigadier Way, however, succeeded at trial on his alternative plea of wilful refusal to consummate and Hodson J. said⁶: “In the case of Way, “however, on the facts stated, accepting as I do his evidence, “the respondent has wilfully refused to consummate the marriage and the marriage is accordingly voidable by English law, “which is the law of the matrimonial domicile. The petitioner “is accordingly entitled to a decree.”

It is true that there seems to have been little or no argument in that case as to whether it was *lex loci* or *lex domicilii* which was applicable, and there is no trace of the judgment of Barnard J. having been cited. It is also true that on appeal by another of the above four petitioners, the Court of Appeal held that the marriages were void for want of form (*Kenward v. Kenward*),⁷ and thus the point as to wilful refusal to consummate should perhaps strictly not have been decided in the *Way* case. None the less, the judgment of Hodson J. retains considerable persuasive effect and, moreover, it is reinforced by the fact that later when he wrote the introduction to Mr. Jackson's work on the Formation and Annulment of Marriage (1951 edition) he stated: “Wilful refusal being a post-nuptial fact, it is difficult to “see how, for example, the *lex loci celebrationis* could have any “application thereto.”

Next I should refer to the judgments of the Court of Appeal in *De Reneville v. De Reneville*.⁸ That well-known case concerned the jurisdiction of the court where the marriage had taken place in Paris—the petitioner being an Englishwoman, who, previous to the marriage, was domiciled in England, the husband being a French national who was domiciled in Paris both at the date of the marriage and at the date of the petition, and France

⁵ [1950] P. 71.⁶ *Ibid.* 80.⁷ [1951] P. 124; 66 T.L.R. (Pt. 2) 157; [1950] 2 All E.R. 297.⁸ [1948] P. 100.

being the place of the matrimonial home. The wife there alleged incapacity on the part of the husband or, alternatively, wilful refusal to consummate the marriage. Lord Greene M.R., whose judgment was supported in toto by Somervell L.J., stated that the wife's allegations went to the essential validity of the marriage and then proceeded to say⁹: "In my opinion, the question whether the marriage is void or merely voidable is for French law to answer. My reasons are as follows: The validity of a marriage so far as regards the observance of formalities is a matter for the *lex loci celebrationis*. But this is not a case of forms. It is a case of essential validity. By what law is that to be decided? In my opinion by the law of France, either because that is the law of the husband's domicile at the date of the marriage or (preferably, in my view) because at that date it was the law of the matrimonial domicile in reference to which the parties may have been supposed to enter into the bonds of marriage." And the following passage is to be found in the judgment of Bucknill L.J.¹⁰: "The wife consented to marry her husband in France and intended to live with him there and also impliedly intended to take her husband's French domicile on the assumption that the marriage was valid. Under these circumstances it seems to me that the question as to the validity of the marriage should be decided by French law." The phrasing of those judgments and the reference to the place where the marriage took place may, of course, be argued to leave open the question, which did not arise in *De Reneville v. De Reneville*,¹¹ as to which law should prevail if there was a conflict between the *lex loci* and *lex domicilii*—they simply tend against *lex fori*.

Turning from authority to general principles, the position is that matters touching the validity of a marriage have, at any rate since *Sottomayor (or se. De Barros) v. De Barros*,¹² been generally regarded as divided into two broad categories. The first related to matters of form and ceremony, to be determined by *lex loci*. The second related to matters "affecting the personal capacity of the parties" at the moment of marriage. Indeed, earlier, Lord Campbell, in his much quoted speech in *Brook v. Brook and Attorney-General*, said¹³: "But while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated,

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⁹ [1948] P. 100, 114.¹² (1877) 3 P.D. 1.¹⁰ *Ibid.* 121.¹³ (1861) 9 H.L.C. 193, 207.¹¹ [1948] P. 100.

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“ the essentials of the contract depend upon the *lex domicilii*, the
“ law of the country in which the parties are domiciled at the
“ time of the marriage, and in which the matrimonial residence
“ is contemplated.”

Wilful refusal to consummate a marriage, clearly, cannot be said to fall within the categories of matters of form and ceremony. To my mind the true question is whether it should be treated as falling within the category of matters affecting the personal capacity of the spouse, in which case *lex domicilii* (which normally coincides with the law pertaining to the country of the husband's domicile at the time of marriage) applies, or whether it should be treated as something akin to matters for which the true remedy is divorce, in which case *lex fori* (e.g., the law pertaining to the domicile of the husband at the date of presentation of the petition, or the law pertaining to the residence of a wife who may bring herself within the provisions of section 18 (1) of the Matrimonial Causes Act, 1950), applies.

It is first to be noted that no direct decision has been cited to me on the question of whether sexual incapacity should be regarded as a matter of “personal capacity” within the meaning of the words used by Cotton L.J. in *Sottomayor (or se. De Barros) v. De Barros*¹⁴ when delivering the judgment of the court. Mr. Ormrod submitted that it should be so regarded, but that any claim for a decree of nullity where a marriage was voidable, as opposed to void, should be decided according to *lex fori*. Dicey on Conflict of Laws, 6th ed., p. 267, treats the point as being open and submits the choice lies between *lex domicilii* or *lex fori*. It is there suggested, on the one hand: “it would be logically and historically correct to hold
“ that, even if the court has jurisdiction in the case of a voidable
“ marriage, it can only pronounce a decree if the ground upon
“ which it is sought is recognized by the law of the husband's
“ domicile at the date of the marriage.” The opposing view is then put as follows: “In answer it may be urged, however, that,
“ as the practice of ‘looking behind the form and regarding the
“ ‘substance of the matter’ has been approved by the Court of
“ Appeal when the question is one of jurisdiction in the case of
“ a voidable marriage, it must be adopted when the question is
“ one of choice of law. The substance of the matter is that
“ someone is claiming to terminate an existing status, and his
“ right to do so should be referred to the law of his domicile
“ at the date the claim is made.”

¹⁴ 3 P.D. 1, 5.

It is next to be observed that upon the authority of the judgment of Denning L.J. in *Ramsay-Fairfax (or se. Scott-Gibson) v. Ramsay-Fairfax*,¹⁵ I feel bound to take the view that there is no distinction in regard to the present issue to be drawn because the proceedings are for wilful refusal to consummate the marriage, rather than for sexual incapacity. The words of the judgment, albeit in a jurisdiction case, were ¹⁶: "No one can call "a marriage a real marriage when it has not been consummated; "and this is the same, no matter whether the want of consum- "mation is due to incapacity or to wilful refusal. Let the "theologians dispute as they will, so far as the lawyers are "concerned, Parliament has made it quite plain that wilful "refusal and incapacity stand together as grounds of nullity "and not for dissolution." Mr. Dobry put the opposite and logical view in a persuasive manner, but I am unable to accede to his argument, supported though it may be by other judicial dicta. I would add that the reasoning in *De Reneville v. De Reneville* ¹⁷ also implicitly rules out any attempt to distinguish between the two in relation to the point now under consideration.

In the light of the matters mentioned above, I find myself unable to agree with Barnard J. that *lex loci* is the proper law applicable to the husband's plea. The choice, in my view, is between *lex domicilii* and *lex fori*. As between those, *lex domicilii* is favoured by Hodson J., by the fact that it was chosen as being the proper alternative by Barnard J. in *Robert (or se. de la Mare) v. Robert* ¹⁸ if he was wrong as to *lex loci*, and by the fact that the judgments in *De Reneville v. De Reneville* ¹⁹ clearly tend against the applicability of *lex fori*. For myself, I would, in support of applying the *lex domicilii*, urge that it would be unfortunate indeed if a marriage were to be held valid or invalid according to which country's courts adjudicated on the issue: and the danger of differences of that type arising is now all the more to be feared by reason of the provisions of section 18 (1) of the Matrimonial Causes Act, 1950. It is surely a matter of some importance that the initial validity of a marriage should, in relation to all matters except form and ceremony (to which a uniform general rule already applies), be consistently decided according to the law of one country alone—a point of view which seems to be supported by the judgment

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¹⁵ [1956] P. 115; [1955] 3 All
 E.R. 695.

¹⁶ [1956] P. 115, 133.

¹⁷ [1948] P. 100.

¹⁸ [1947] P. 164.

¹⁹ [1948] P. 100.

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of Bucknill L.J. in *De Reneville v. De Reneville* ²⁰—and that consistency cannot be attained if the test is *lex fori*.

Being of the opinion that the relevant proper law is either *lex domicilii* or *lex fori*, it is not, however, in the present case essential to come to a final conclusion as between the two. The husband having been domiciled in England, both at the date of the marriage and when he presented his petition, it is the law of this country that applies in each case. Further, if, and in so far as there may be, according to Mr. Dobry's submission, a third alternative as to the law to be applied in the present case, viz., the law of the intended matrimonial domicile (should that be distinguishable from *lex domicilii*), again, no difference would be involved, for both spouses originally intended to live and settle here after the marriage.

The law of this country being thus the proper law by which to test the validity of the marriage in relation to the allegations made by the husband, I now turn to the facts to see whether the husband is entitled to relief by virtue of section 8 (1) of the Matrimonial Causes Act, 1950. That, in turn, depends on the view taken of the evidence of what occurred on the wife's arrival in England and during the short period she remained there.

[His Lordship then considered the evidence and found the facts set out above, and continued:] It is clear that the wife had a firm and decisive objection to the petitioner qua husband, that she had made up her mind never to live with him and she was determined in no way to be a wife to him.

In those circumstances, it seems that she was unswerving in denying the opportunity to the husband to consummate the marriage and Mr. Ormrod, very rightly, did not feel able to submit that such conduct, if proved, did not amount to a wilful refusal to consummate within the meaning of section 8 (1). The husband is accordingly entitled to his decree of nullity.

Decree nisi.

Solicitors: *Leader, Henderson & Leader; the Official Solicitor.*

J. B. G.

²⁰ [1948] P. 100, 122.

ANDREWS v. ANDREWS AND SULLIVAN
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1958
April 30.

Wrangham J.

Infant—Ward of court—Jurisdiction—Divorce Division.

In October, 1957, a father obtained an order in the Divorce Division for the custody of the two children of himself and his divorced wife. On April 15, 1958, the mother made an application to the Chancery Division, the effect of which was that the children automatically became wards of court. Nine days later the father issued a summons in the Divorce Division asking for leave to take the children permanently out of the jurisdiction. At the hearing of the father's summons on April 29, 1958, the mother opposed the application, first, on the ground that, in the circumstances, the Divorce Division had no jurisdiction to entertain the matter and, secondly, on the merits:—

Held, that since the powers of the Divorce Division were less extensive than those possessed by the Chancery Division over wards of court, the former were superseded by the latter; the Chancery Division had, moreover, on the mother making her application, become, in effect, the guardian of the wards of court, and it was that division only which could give leave for them to go out of the jurisdiction or otherwise control their persons or property. It followed that the Divorce Division ought not to entertain the father's application which must, therefore, be dismissed.

Hyde v. Hyde (1888) 13 P.D. 166; 4 T.L.R. 586, and *In re E. (An Infant)* [1956] Ch. 23; [1955] 3 All E.R. 174 applied.

Manders v. Manders (1890) 7 T.L.R. 149 distinguished.

SUMMONS for leave to take children out of the jurisdiction.

On October 25, 1957, a decree nisi for dissolution of the marriage of the parties was pronounced, the custody of the two children being granted to the father, who was the petitioner, and the decree was made absolute on February 12, 1958. On April 15, 1958, the mother applied to the Chancery Division for an order that the infants be made wards of court. On April 24, 1958, the father made an application to the Probate, Divorce & Admiralty Division that he should be at liberty to take the two infant children of the marriage to reside permanently in Auckland, New Zealand. The mother opposed the application; first, upon the ground that, in the circumstances, the Divorce Division had no jurisdiction which it could or should exercise, and, secondly, upon the merits. The matter was argued in chambers and adjourned into open court for judgment.

John B. Latey Q.C., Victor Williams and J. C. J. Tatham for the father.

Sir Frank Soskice Q.C. and C. D. Ellison Rich for the mother.

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WRANGHAM J. referred to the facts and the provisions of section 9 (2) of the Law Reform (Miscellaneous Provisions) Act, 1949,¹ and R.S.C., Ord. 54P, r. 3,² and continued: When the father issued his summons in this Division nine days after the mother's originating summons in the Chancery Division, and also when it was heard by me five days later, the children were both wards of court. The question, therefore, arises whether this Division can or ought to make such an order as is here applied for in the case of infants who are wards of court.

The jurisdiction of this Division to make such an order is derived from section 26 (1) of the Matrimonial Causes Act, 1950,³ which re-enacted section 193 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925. That section empowers the court to make such provision as appears just with respect to the custody, maintenance and education of the children, the marriage of whose parents is the subject of the proceedings, or, if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the court. This last phrase clearly means proceedings to make the children wards of court, in which event the Chancery Division, to which the wardship of infants is specifically assigned by section 56 (1) (b) of the Supreme Court of Judicature (Consolidation) Act, 1925, would have power to control their persons and property including, for instance, the power to give or refuse leave to them to quit the jurisdiction. It seems obvious that the section contemplates that an infant who has been

¹ Law Reform (Miscellaneous Provisions) Act, 1949, s. 9: "(1) Subject to the provisions of this section, no infant shall be made a ward of court except by virtue of an order to that effect made by the court. (2) Where application is made for such an order in respect of an infant, the infant shall become a ward of court on the making of the application, but shall cease to be a ward of court at the expiration of such period as may be prescribed by rules of court unless within that period an order has been made in accordance with the application."

² R.S.C., Ord. 54P, r. 3: "Unless within 21 days after its issue an appointment is obtained for the hearing of the summons the infant shall cease to be a ward of court at

"the expiration of the said period of 21 days. Upon an appointment being obtained as aforesaid the infant shall continue to be a ward of court until the determination of the application."

³ Matrimonial Causes Act, 1950, s. 26 (1): "In any proceedings for divorce or nullity of marriage or judicial separation, the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children the marriage of whose parents is the subject of the proceedings, or, if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the court."

made a ward of court of the Chancery Division, as a result of proceedings directed by this Division, shall no longer be subject to the control of this Division. It would be absurd if, in such a case, a person wishing to take an infant abroad had to apply for leave to both Divisions, who might, indeed, take contrary views upon the merits of the application. But, of course, it does not follow from this that this Division cannot or should not exercise its jurisdiction over infants who have become wards of court without its direction because it could be argued that, by making such a direction, this Division impliedly abdicated in favour of the Chancery Division or delegated its powers thereto. I was told by Mr. Latey that, in practice, where an infant was subject to the control of one Division, as a ward of court, and the other Division, under section 26 (1) of the Matrimonial Causes Act, 1950, either Division exercised jurisdiction upon any matter of which it was seized before the other. Logically this seems to me to be indefensible. If an infant subject to the control of this Division under section 26 (1) becomes a ward of court one of three positions, as I think, is created; either the infant is subject to both courts so that, upon a proposal to take him abroad, leave must be asked of both Divisions, or the jurisdiction of the Chancery Division supersedes that of this Division, or the converse occurs. In my opinion the true view is that the jurisdiction of the Chancery Division supersedes that of this Division.

The jurisdiction of this Division was originally conferred upon the Divorce Court by section 35 of the Matrimonial Causes Act, 1857, which was in somewhat similar terms to section 26 (1) of the Act of 1950, save that there was a specific reference to the Court of Chancery as the court of protection of children. Thirty-one years later the Court of Appeal had to consider, in *Hyde v. Hyde*,⁴ whether the Divorce Division had, under section 35, powers in relation to infants as full as those possessed by the old Court of Chancery. They held that it had not. Cotton L.J. said⁵: "... the 35th section of the Divorce Act does not enable " the court by its order to make the infants wards of the Divorce " Division . . . " Bowen L.J. said⁶: "... the Divorce Division " has no wards of court . . . " and Fry L.J. said⁷: " I think that " the section itself shews it was not intended by the legislature to " clothe the Court of Probate with as wide a jurisdiction as the

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⁴ (1888) 13 P.D. 166; 4 T.L.R. 586.

⁶ Ibid. 176.

⁷ Ibid. 178.

⁵ 13 P.D. 166, 174.

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“ Court of Chancery had in respect of infants, because it enables
 “ the Court of Divorce and Matrimonial Causes, if it see fit, to
 “ direct proceedings to be taken for placing the children under the
 “ protection of the Court of Chancery.” If, then, the powers of
 this Division over infants are less extensive than those possessed
 by the Chancery Division over wards of court, it seems likely that
 when the latter come into existence, they supersede the former.
 There is, however, another aspect of the matter. The Chancery
 Division is, in effect, the guardian of a ward of court either by
 itself or by any guardian appointed by it: see *In re E. (An Infant)*.⁸ It cannot, therefore, be right for any other court to
 issue orders or directions about the control of the person of an
 infant who is in the custody, or what amounts to the custody, of
 the Chancery Division. No statute or rule draws any distinction
 between the position of an infant who has a guardian appointed
 by the Chancery Division and an infant, such as the children in
 this case, for whom no such guardian has been appointed; indeed,
 it is clear from *In re E. (An Infant)*,⁸ cited above, that no such
 distinction can exist.

Mr. Latey relied on *Manders v. Manders*.⁹ In that case the
 decree nisi had been pronounced giving custody of a child to her
 father. The mother applied, by originating summons under the
 Guardianship of Infants Act, 1886, to the Chancery Division for
 access, but Stirling J. refused the application on the ground that
 it ought to have been made to the Divorce Court. In my view,
 that case is distinguishable on the ground that the jurisdiction of
 the court under the Guardianship of Infants Acts is less extensive
 than that possessed by the Chancery Division over wards of court:
 see *In re E. (An Infant)*.¹⁰ There was in *Manders v. Manders* ¹¹
 no question of the Chancery Division being, in any sense, the
 guardian of the child; the jurisdiction under the Guardianship of
 Infants Acts being in no way superior to or more extensive than
 the jurisdiction of the Divorce Court, there was no reason for the
 latter to give way to the former.

In my judgment the children in this case became, on April 15,
 1958, and still are, wards of court and as such are in the custody of
 the Chancery Division. The Chancery Division is their guardian
 and it is only their guardian who can give leave for them to go out

⁸ [1956] Ch. 23; [1955] 3 All
 E.R. 174.

¹⁰ [1956] Ch. 23.

¹¹ 7 T.L.R. 149.

⁹ (1890) 7 T.L.R. 149.

of the jurisdiction or otherwise control their persons and property. It follows that I decline to exercise jurisdiction and dismiss this application accordingly.

Order accordingly.

Solicitors: *Boxall & Boxall; Wegg-Prosser & Co.*

E. J.

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HUGHES v. HUGHES.

1958
April 23.

Solicitor—Costs—Lien—Divorce—Whether absolute lien in divorce suit. Husband and Wife—Divorce—Public interest in—Solicitor's lien for costs.

Wrangham J.

A petitioner in divorce proceedings discharged his solicitors and instructed a second solicitor, who obtained the papers in the suit from the first solicitors subject to his undertaking to respect their lien for costs. The petitioner subsequently discharged the second solicitor and intructed his present solicitors. On the application of the petitioner the registrar made an order that the second solicitor should deliver up the papers to the petitioner or his present solicitors within 14 days on the undertaking of the present solicitors to respect the lien of the first and the second solicitors. From this order the second solicitor^a appealed:—

Held, that, since a divorce suit involved questions of status, it was, of its very nature, a proceeding in which persons other than the petitioner were interested and, moreover, one in the full and complete investigation of which the public had an overriding interest; and that the assertion by the second solicitor of an absolute right to refuse to deliver up material papers in the divorce suit pending the payment of his costs was liable to cause embarrassment to persons other than the petitioner and could not be maintained; the appeal must be dismissed.

In re Boughton (1883) 23 Ch.D. 169, *Boden v. Hensby* [1892] 1 Ch. 101 and *Dessau v. Peters, Rushton & Co. Ltd.* [1922] 1 Ch. 1 applied.

APPEAL from decision of registrar.

On October 10, 1956, the petitioner presented a petition alleging desertion by his wife. He became dissatisfied with the solicitors who then acted for him and discharged them on November 11, 1957. They handed over the papers to a second solicitor subject to his respecting their lien for costs: it was not clear whether this arrangement was made by word of mouth or in writing. On March 26, 1958, the petitioner discharged the

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second solicitor. On March 31, 1958, Mr. Registrar Compton Miller made an order directing the second solicitor to deliver the papers in his possession to the petitioner or his present solicitors within 14 days on the undertaking of those solicitors to respect the lien of the first firm of solicitors and of the second solicitor. Against that order the second solicitor appealed, contending that he had a lien upon the papers for his costs which he was entitled to assert without qualification. The matter was argued in chambers and adjourned into open court for judgment.

S. E. Brodie for the second solicitor.

A. M. Ryan for the petitioner.

WRANGHAM J. referred to the facts and continued: The general rule is that a solicitor, who is discharged by his client during an action (otherwise than for misconduct), can retain any papers in the cause in his possession until his costs have been paid: *In re Rapid Road Transit Co.*¹ That rule, however, is subject to this qualification, that this absolute lien can not be asserted where the cause is one in which other parties are interested, and where those other parties would be embarrassed by the assertion of such a lien. In such a case the solicitor must deliver up the papers subject to his lien, that is to say, subject to his right to have the papers returned to him at the conclusion of the proceedings for which they are needed, and to such undertakings as may be required to make his lien effective against his former client: *In re Boughton*.² This qualification has been applied in the case of a partition action: *Boden v. Hensby*,³ and an action for the dissolution of a partnership: *Dessau v. Peters, Rushton & Co. Ltd.*⁴ The question now arises whether a petition for divorce should be regarded as a matter in which parties other than the petitioner are interested, and one in which the withholding of relevant documents might embarrass those parties, or as being analogous to a civil action in which the plaintiff alone has a beneficial interest; in the latter case, as Sargant J. pointed out in *Dessau v. Peters, Rushton & Co. Ltd.*,⁵ the plaintiff's previous solicitor would be entitled to enforce an absolute lien, however much it might embarrass the plaintiff, whereas in the former case only the qualified lien could be asserted.

¹ [1909] 1 Ch. 96.

² (1883) 23 Ch.D. 169.

³ [1892] 1 Ch. 101.

⁴ [1922] 1 Ch. 1.

⁵ *Ibid.* 4.

In my judgment a petition for divorce can never properly be described as a matter in which the petitioner alone is interested. Divorce affects status, the status not merely of the petitioner, but of one or more other parties. In many petitions (though not in this one) the interests of children of the parties are concerned; and it would be odd if the right of a solicitor in a divorce case to assert an unqualified lien depended upon the question whether or not there were children of the parties to the marriage in issue. A respondent may have an interest in a divorce petition of quite a different character to that of a defendant in a civil action; for there are many respondents whose welfare depends very much upon the success of uncontested petitions. That does not, indeed, apply to this particular case, where the respondent denies the petitioner's charge of desertion and has presented a cross-prayer based on desertion by him; but it is none the less, I think, a potent argument to show that a divorce petition is, by its very nature, a proceeding in which others than the petitioner are interested. Finally, there is an overriding public interest in a full and complete investigation of the facts of any divorce case. Divorce cases can not be disposed of by agreement, like civil litigation: the Matrimonial Causes Act, 1950,⁶ imposes upon the court a duty to inquire into matters and to refuse to grant decrees unless satisfied of certain facts, irrespective of the wishes of the parties; and there is provision for the intervention in divorce proceedings, in certain circumstances, of the Queen's Proctor, representing the public, and indeed of any individual member of the public. It seems to me that the assertion of an absolute right to refuse to deliver up material papers must be calculated to embarrass that full investigation of the matter which the public interest requires in divorce proceedings. I, therefore, hold that the second solicitor does not possess the absolute lien which he claims and that the order of Mr. Registrar Compton Miller, which gave effect to his qualified lien, was correct.

There remains a subsidiary question upon that part of the registrar's order which directed that the second solicitor be relieved from his undertaking to the first firm of solicitors. It is contended that the second solicitor personally undertook to pay the costs of that firm, and that the registrar had no jurisdiction to deal with that undertaking. In my opinion the second solicitor did no more, in his transaction with the first

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firm of solicitors, than to undertake to do everything to make their lien for costs effective against the petitioner; and if he complies with the registrar's order he will be fulfilling that undertaking. I am disposed to think that that part of the registrar's order which in terms relieves the second solicitor from his undertaking is mere surplusage, the true view being that the undertaking has been fully complied with; but the point appears to be of no practical importance. The appeal will therefore be dismissed.

Order accordingly.

Solicitors: *Edward S. Isaacs; Adams & Co.*

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June 16, 30;
July 30.

Hodson,
Morris and
Sellers L.JJ.

*Solicitor—Costs—Lien—Divorce—Whether absolute lien in divorce suit.
Husband and Wife—Divorce—Public interest in—Solicitor's lien for costs.*

A petitioner in divorce proceedings discharged his solicitors and instructed a second solicitor, who obtained the papers in the suit from the first solicitors subject to his undertaking to respect their lien for costs. The petitioner subsequently discharged the second solicitor and instructed his present solicitors. On the application of the petitioner the registrar made an order that the second solicitor should deliver up the papers to the petitioner or his present solicitors within 14 days on the undertaking of the present solicitors to respect the lien of the first and the second solicitors. From this order the second solicitor appealed. Wrangham J. dismissed the appeal.

On a further appeal:—

Held, that the general rule—that a solicitor who was discharged by his client during a civil action, otherwise than for misconduct, was entitled to retain, as against his client, any papers in the case in his possession until his costs had been paid—applied whether the client's papers were of any intrinsic value or not; and that while divorce affected status and the public interest was involved, divorce proceedings inter partes were still civil litigation, and there was no reason why the rights of solicitors in such cases should differ from their rights in other cases. Accordingly, the second solicitor was entitled to his lien.

Per curiam. This lien should be preserved in the public interest in order that litigation may be properly conducted with due regard to the interest, not only of litigants, but also of the officers of the court who serve those interests.

Decision of Wrangham J., ante, p. 221; [1958] 2 All E.R. 366 reversed.

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APPEAL from order of Wrangham J.

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On October 10, 1956, the petitioner presented a petition alleging desertion by his wife. He became dissatisfied with the solicitors who then acted for him and discharged them on November 11, 1957. They handed over the papers to a second solicitor, Mr. Edward Isaacs, subject to his respecting their lien for costs. On March 26, 1958, the petitioner discharged Mr. Isaacs. On March 31, 1958, Mr. Registrar Compton Miller made an order directing Mr. Isaacs to deliver the papers in his possession to the petitioner or his present solicitors within 14 days on the undertaking of those solicitors to respect the lien of the first firm of solicitors and of Mr. Isaacs. Against that order Mr. Isaacs appealed, contending that he had a lien upon the papers for his costs which he was entitled to assert without qualification.

Wrangham J. dismissed an appeal by Mr. Isaacs, holding that while the rule as to solicitor's lien for unpaid costs was unqualified where no other person than the client was interested, divorce proceedings were in the same category as actions in which third parties were interested, having regard to the public interest involved. He therefore disregarded the lien.

Mr. Isaacs appealed.

Roger Ormrod Q.C. and *S. E. Brodie* for the appellant Isaacs. The appellant claims that he has a lien for his unpaid costs on the papers and documents relating to the petitioner's divorce petition, some of which he received from Elvy Robb & Co. and which he has undertaken to hand back to them. A solicitor has a lien for his unpaid costs and the courts will only in very exceptional circumstances override that right. In the present case the judge has gone far beyond anything previously decided; the ratio in cases where the court has overridden the lien has been that creditors or third parties were interested in the proceedings, for example, in winding up or the administration of an estate.

The court ought not and cannot order the appellant to hand over the papers. The general principle is that at common law a solicitor has a lien on papers in his possession for his costs, and it is submitted that the principle also applies in divorce cases. This lien is available only against his client. If the client is liable to produce the documents at the instance of third parties,

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i.e., on subpoena duces tecum, or discovery, the solicitor must produce them. Where the solicitor is engaged in the litigation his lien is not absolute. An important distinction is drawn between (1) a solicitor who discharges himself, (2) a solicitor who is still acting, and (3) a solicitor who is discharged by his client. A solicitor who discharges himself will be ordered by summary order to deliver up the papers to the new solicitor, subject to their being returned to him at the conclusion of the proceedings. He has a qualified lien: see *Colegrave v. Manley*,¹ *Commerell v. Poynton*² and *Heslop v. Metcalfe*.³ A solicitor's duty to his client persists while he is still acting and he must produce all necessary documents to the court: *In re Hawkes*.⁴

A solicitor who is discharged by his client has the general right to embarrass his client by withholding papers, and the court will not compel him to produce them at the instance of the client: *Bozon v. Bolland*⁵; *Lord v. Wormleighton*⁶; *In re Faithfull*,⁷ and *In re Rapid Road Transit Co.*⁸ The absolute character of the lien of a solicitor who has been discharged by the client has, however, been modified. A solicitor cannot embarrass a suit by keeping back papers relating to an estate that is being administered by the court: *Belaney v. Ffrench*.⁹ That case is the foundation of the cases upon which the exceptions to the rule depend. *In re Boughton*¹⁰ followed *Belaney v. Ffrench*,¹¹ and the principle was extended by analogy to proceedings of a representative character, to inquiries as to incumbrances and to partnership actions: see *Dessau v. Peters, Rushton & Co.*¹² (receiver appointed) and *Boden v. Hensby*.¹³ The exceptions to the lien are all of a very exceptional character. In every case where the discharged solicitor's lien has been modified, the court itself was administering the matter and had appointed a receiver or a liquidator or had ordered inquiries. [Reference was also made to *In re Capital Fire Insurance Association*.¹⁴]

Miss Anita Ryan, for the petitioner, informed the court that, being now convinced that the papers and documents in question were not necessary for the success of the divorce petition, the petitioner withdrew his opposition to the appeal.

¹ (1823) Turn. & Rus. 400.

² (1818) 1 Swanst. 1.

³ (1837) 3 My. & C. 183.

⁴ [1898] 2 Ch. 1, 9.

⁵ (1839) 4 My. & C. 354.

⁶ (1822) Jac. 580.

⁷ (1868) L.R. 6 Eq. 325.

⁸ [1909] 1 Ch. 96.

⁹ (1873) L.R. 8 Ch. 918.

¹⁰ (1883) 23 Ch.D. 169.

¹¹ L.R. 8 Ch. 918.

¹² [1922] 1 Ch. 1.

¹³ [1892] 1 Ch. 101.

¹⁴ (1883) 24 Ch.D. 408.

Counsel for the appellant asked the court, having regard to the importance of the issue, nevertheless, to pronounce judgment on the appeal.

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Cur. adv. vult.

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July 30. HODSON L.J. delivered the following judgment of the court: This is an appeal from an order of Wrangham J. affirming a decision of Mr. Registrar Compton Miller, dated March 31, 1958, directing a solicitor, Mr. Isaacs, to deliver to the petitioner's present solicitors, Adams & Co., the papers in his possession relating to the cause, the cause being a suit for divorce.

The question involved is an important one, although it is in the present case, as the petitioner now recognizes, of no significance, since there are said to be no papers in the possession of Mr. Isaacs which the petitioner cannot pursue his cause without. There is no evidence as to the nature of the papers in question except that they include an opinion of counsel and some draft particulars. Accordingly, the appeal has not been resisted, but the judgment must stand unless the appellant Isaacs succeeds in his contention that the order ought not to have been made, whether the petitioner himself takes any personal interest in the result of these apparently futile proceedings or not.

The petitioner originally instructed Elvy Robb & Co., but on November 11, 1957, he discharged this firm and instructed as his new solicitor Mr. Isaacs, who took over the papers, giving at the same time a written undertaking to respect the lien of Elvy Robb & Co. On March 26, 1958, the petitioner discharged Mr. Isaacs and subsequently instructed his present solicitors, Adams & Co. As a matter of history, the petitioner appears to have followed a managing clerk, who was at one time with Elvy Robb & Co., afterwards with Mr. Isaacs, from whose employment he was discharged in December, 1957, and is now in the employment of Adams & Co.

The importance of the question lies in this: Mr. Isaacs asserts that he has a lien upon such papers as there are in his possession, which he is entitled to assert against the petitioner without qualification.

There is no doubt that a solicitor who is discharged by his client during an action, otherwise than for misconduct, can retain any papers in the cause in his possession until his costs have been paid: see *In re Rapid Road Transit Co.*¹ This rule applies,

¹ [1909] 1 Ch. 96.

C. A. as the authorities show, whether the client's papers are of any
1958 intrinsic value or not, although it would seem that so far as the
HUGHES solicitor's working papers are concerned, where the work has
v. not been paid for by the client, the solicitor would not be com-
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together from the lien.

The authorities, however, draw no distinction between any particular class of papers, although no doubt the matter has until now only arisen for decision by the courts where there were some valuable or essential documents in question. Such have been held to include deeds, papers or other articles which are the property of the client and have come into the possession of the solicitor in the course of his professional employment, as, for example, a bill of exchange, letters patent, application for shares, a debenture trust deed, a policy of insurance and letters of administration.

The judge, however, while recognizing the rule as being unqualified where no other parties were interested, held that divorce proceedings were in the same category as actions in which third parties were interested, having regard to the public interest involved, and therefore disregarded the lien. It is true, as he said, that divorce affects status and the public interest is involved; but the fact remains that divorce proceedings inter partes are still civil litigation and we cannot see any compelling reason why the rights of solicitors should in such cases differ from their rights in other cases. The litigant need not change his solicitor without good cause. It would be odd if he were in effect able to get solicitors' work done for nothing by the simple expedient of changing his solicitor as often as he chose, leaving a trail of unpaid costs in his wake and demanding the papers without payment when he had no just cause to complain of the conduct of the solicitors instructed and discarded.

If he is hampered in the presentation of his case to his own disadvantage by having changed his solicitors without good cause, the public interest does not require that a litigant who seeks to put away his wife should be in a better position to obtain documents over which the solicitor has a lien than a litigant in any other civil proceedings.

It is true that there is an aspect of public interest which requires a full and complete investigation of the facts in a divorce case so that, whether or not the opposite party sets up a defence, the court will not grant a decree unless satisfied of certain

matters. This duty is now imposed on the court by the Matrimonial Causes Act, 1950, and in this respect divorce proceedings differ in a material respect from other civil proceedings. This does not seem to us to involve the necessity of overriding the lien. It is true that the petitioner may be prevented from producing incriminating documents which would or might imperil his chances of success, such, for example, as correspondence between himself and his wife tending to show that a collusive bargain had been entered into to buy off a defence. In such a situation the petitioner's duty to refer to such documents would remain and he would be unable to produce them until he had satisfied the claim of his former solicitor. If the judge held that he could not pronounce a decree nisi in such a case, no injustice to the petitioner or the public would result. As the matter stands, we do not think there is an existing or potential third party interest which should override the solicitor's lien. This lien should be preserved in the public interest in order that litigation may be properly conducted with due regard to the interest, not only of litigants, but also of the officers of the court who serve those interests.

There is a subsidiary question, since the appellant has appealed against that part of the order which purports to relieve him of his undertaking to the first firm of solicitors. We agree with the judge that if the order were to stand, the appellant could not be held to have broken his undertaking if he were compelled by the court to hand over papers to the petitioner's latest solicitors. At the same time, we think that the appellant is correct in saying that there cannot be any jurisdiction to relieve him of an undertaking given by him to another solicitor. This is not a case where an undertaking having been given to the court, the undertaker can be relieved by the court itself from complying with the promise given.

The appeal is therefore allowed.

Appeal allowed.

Solicitors: *Edward Isaacs; Adams & Co.*

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DEACOCK *v.* DEACOCK.

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June 17, 18.

Hodson and
Morris L.JJ.,
Vaisey J.

Husband and Wife—Maintenance—High Court—Death, presumption of, and dissolution of marriage—Decree in favour of husband—Wife not dead—Application by wife for maintenance—Whether distinction between “dissolution” and “divorce”—Matrimonial Causes Act, 1950 (14 Geo. 6, c. 25), ss. 16, 19.

Husband and Wife—Divorce—Death.

A husband was granted a decree under section 8 of the Matrimonial Causes Act, 1937 (now section 16 of the Act of 1950¹) presuming the death of his wife and dissolving the marriage. She later learned of the decree and applied under section 19 (3) of the Act of 1950 for maintenance. On the question whether the court had jurisdiction to entertain the application:—

Held, that the court had jurisdiction since the words “decree for “divorce” in section 19 (3) included a decree “of dissolution of “marriage” granted under section 16. Notwithstanding that section 19 of the Act of 1950 refers to maintenance being granted on any decree “for divorce,” whereas section 16 refers to a decree of presumption of death and “dissolution” of marriage, it was apt to refer to “divorce” when speaking of parties to the marriage bond, and “dissolution” when speaking of the bond itself.

Dictum of Pearce J. in *Wall v. Wall* [1950] P. 112, 121; 65 T.L.R. 731; [1949] 2 All E.R. 927 disapproved.

APPEAL from Barnard J.

The parties were married in Greece in 1918, the husband, Walter Victor Deacock, being a British subject employed in the British consular service, and the wife, Honorine Evangeline, being a Greek national. They lived together in Athens until 1930, when the husband, having made the acquaintance of another Greek woman, left Greece with her and never went back to the wife or had any communication with her. He subsequently married the other woman. In 1943 the husband took proceedings in England to presume the death of the wife and for the dissolution of the marriage under section 8 of the Matrimonial Causes Act, 1937 (now section 16 of the Act of 1950).¹ A final decree presuming the death of the wife and dissolving the marriage was granted. The wife in fact was still living in Greece and until 1951 had no

¹ Matrimonial Causes Act, 1950, s. 16: “Any married person who “alleges that reasonable grounds “exist for supposing that the other “party to the marriage is dead may, “if he is domiciled in England, pre- “sent a petition to the court to have

“it presumed that the other party is “dead and to have the marriage dis- “solved, and the court, if satisfied “that such reasonable grounds exist, “may make a decree of presumption “of death and of dissolution of the “marriage.”

knowledge of the above legal proceedings, the only effort made to give notice to her of the petition being an advertisement in the *News Chronicle* newspaper which, Greece being at that time occupied by the Germans, could not be obtained in Greece. The wife, having received no maintenance from the husband, was unable herself to finance legal proceedings but received advice and assistance from friends, and in 1955 obtained legal aid and issued a summons for maintenance against the husband.

The summons was dismissed by Barnard J. (affirming an order of the registrar) on the ground that it had not been brought in time.

By leave of the Court of Appeal the wife appealed on the ground that under section 19 (3) ² of the Matrimonial Causes Act, 1950, the court had jurisdiction to grant an application for maintenance if, having regard to the circumstances of the case, it was made within a reasonable time after the decree.

J. B. Latey Q.C., E. R. Moulton-Barrett and J. B. Gardner for the wife.

S. K. de Ferrars and J. M. Rankin for the husband.

The following cases were cited in argument: *Scott v. Scott* ³; *Robertson v. Robertson* ⁴; *Fisher v. Fisher* ⁵; *Simmonds v. Simmonds* ⁶; *Hasting v. Hasting* ⁷; *Shott v. Shott* ⁸; *Wall v. Wall*.⁹

During the hearing of the appeal *de Ferrars*, for the husband, contended that a distinction was drawn in the Matrimonial Causes Acts between dissolution of marriage and divorce, and that as section 19 of the Act of 1950 spoke of "divorce" and section 16 referred to "dissolution" of marriage there was no statutory power to apply for maintenance in the case of presumption of death. This was not a decree of divorce and the statute only

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² S. 19 (3): "On any decree for "divorce or nullity of marriage, the "court may, if it thinks fit, by order "direct the husband to pay to the "wife, during their joint lives, such "monthly or weekly sum for the "maintenance and support of the "wife as the court may think "reasonable."

³ [1921] P. 107, 120, 124; 37 T.L.R. 158.

⁴ (1883) 8 P.D. 94.

⁵ [1942] P. 101; 58 T.L.R. 191; [1942] 1 All E.R. 438.

⁶ [1956] P. 47; [1955] 2 All E.R. 481.

⁷ [1948] P. 68; 63 T.L.R. 564; [1947] 2 All E.R. 744.

⁸ [1952] 1 T.L.R. 393; [1952] 1 All E.R. 735.

⁹ [1950] P. 112; 65 T.L.R. 731; [1949] 2 All E.R. 927.

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gave maintenance when there had been a decree of divorce. Unless there was a distinction such as he contended for, subsection (3) of section 16 was needless. This argument was supported by the decision of Pearce J. in *Wall v. Wall*.⁹

Moulton-Barrett, in reply, submitted that the statute made no such distinction as was contended for by counsel for the husband. The word "divorce" was used in the statute in relation to the parties to the marriage bond and the word "dissolution" in reference to the marriage bond itself. In the present case the court "dissolved" the marriage and that word was used in all decrees. Subsection (3) of section 16 was an attempt at clarification which only caused greater confusion. Provided her application was made "on the decree" the wife was entitled to an order for maintenance.

[The case is reported solely on this point.]

HODSON L.J. stated the facts, and said that language had been used in certain cases which seemed to suggest that whether or not an application for maintenance had been made "on [the] decree" within section 19 (3) of the Matrimonial Causes Act, 1950, was a pure matter of discretion, whereas it was more accurately stated in *Scott v. Scott*¹ as being a question in each case of deciding whether the application was in truth made on the decree or within a reasonable time, having regard to all the circumstances of the case. His Lordship continued: A further point, which was not taken before the judge, but which has been taken in this court is that section 19 (3) of the Matrimonial Causes Act, 1950, following on the language of earlier Acts, speaks of a "decree for divorce," and all the other sections to which we have been referred speak of decrees "for divorce," with the exception of section 16, which takes the place of section 8 of the Act of 1937 and which, having prescribed the remedy for a married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead, declares that a petition may be presented to have it presumed that the other party is dead and to have the marriage dissolved, and the court, if satisfied that such reasonable grounds exist, may make a decree of presumption of death and of dissolution of the marriage.

⁹ [1950] P. 112; 65 T.L.R. 731;
[1949] 2 All E.R. 927.

¹ [1921] P. 107; 37 T.L.R. 158.

It is said that there is a distinction between the words "dissolution of marriage" and "divorce," and that, as section 19 contains the word "divorce" and section 16 does not, there is no statutory power to apply for maintenance at all in the case of presumption of death, the assumption contended for by counsel being that, since the person concerned is presumed to be dead, therefore (I suppose) they are dead and no application for maintenance is ever likely to be received from them. Of course, it does not in the least follow that because the courts presume a person to be dead that is a true fact—as this case demonstrates. In my view the word "dissolution" relates to the marriage bond itself, whereas the word "divorce" relates to the parties to the marriage bond; and it is apt to refer to "divorce" when speaking of parties and "dissolution" when speaking of the bond.

As the decree in this case shows, what has been done by the court is to dissolve the marriage; and the word "dissolved" is used in this and in all other decrees, as it has been used for years: the word "divorce" is not used. The intention of the statute in providing this remedy of presumption of death appears to have been quite clear. It would not have been of any avail to declare that a man or woman was dead because that would not enable the other party to remarry unless they really were dead. So it was added to the presumption that the court should dissolve the marriage; and that is what has happened in this case.

I confess that I cannot see any force in the argument, as so far stated, that there is no remedy by way of application for maintenance after a decree of this kind has been pronounced. The argument is supported by the language of section 16 (3) which provides: "Sections 10 to 13 of this Act shall apply to a petition 'and a decree under this section as they apply to a petition for 'divorce and a decree of divorce respectively'—thereby lending some verbal support to the argument that there is a distinction between a petition for dissolution and a petition for divorce. I accept that there is that verbal support for the argument; but the explanation of the reference to the preceding sections 10 to 13 of this Act seems to be that the legislature thought it well to draw attention to the fact that these sections would apply to these cases under section 16 although the opposite party to the marriage might be taken to be dead, and it had not, I suppose, occurred to the legislature that what happened in this case might often happen,

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namely, that the opposite party to the marriage might turn out to be alive, which might bring into operation, or which might provide the necessity of a litigant relying on, the succeeding sections of the statute, of which section 19, dealing with maintenance, is one.

I have not overlooked the fact that this argument has some support from a decision of Pearce J. in *Wall v. Wall*,² where the judge was considering the power to decree dissolution of marriage in connexion with the presumption of death. The point taken there was that the domicile of the applicant was not in this country, and the judge came to the conclusion that since the other party (who was in that case the husband) was, from the nature of the proceedings, supposed to be dead, it would be rather absurd to attach to his domicile any particular virtue as founding jurisdiction, and the residence of the wife herself was held to be sufficient. But in considering this question in support of his conclusion he referred³ to section 8 (3) of the Act of 1937 (which was replaced by section 16 (3) of the Act of 1950) which provides that the earlier sections should apply to a decree under this section as they applied to a petition for divorce and a decree of divorce respectively. For the reasons which I have given, I confess that I cannot find myself in agreement with this part of the reasoning of the learned judge—although, of course, it does not mean that I am in any way dissenting from the conclusion which he reached in the case under consideration.

This second point is one which also fails, in my judgment; and the appeal should be allowed.

MORRIS L.J., agreeing that the right conclusion was that the application was made “on [a] decree” for divorce as the meaning of that phrase had been judicially determined, continued: I entirely agree that this appeal succeeds on the second point which has been debated in this court, though not formally taken before the judge. I am in full agreement with what my Lord has said, and I do not desire to add anything.

VAISEY J. I also fully agree with the conclusions at which my Lords have arrived. Nor do I think that I have any real ground of difference with any of the reasons which they have expressed in supporting that conclusion. How far the decision of

² [1950] P. 112; 65 T.L.R. 731; ³ [1950] P. 112, 121.
[1949] 2 All E.R. 927.

what is a "reasonable time," having regard to the interpretation of the word "on" which the courts have given, involves the exercise of judicial discretion, is probably a question of words rather than of substance: but if and so far as that question has any substance I would myself desire to regard it as an open one.

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Vaisey J.

Appeal allowed.

Solicitors: *J. A. H. Powell; Stoneham & Sons.*

A. W. G.

EDWARDS v. EDWARDS.

Solicitor—Costs—Proceedings improperly continued—Personal liability of solicitor to pay costs—Position under legal aid unaltered—Proceedings under section 23 of the Matrimonial Causes Act, 1950 (14 Geo. 6, c. 25)—Desirability of initial inquiries—Effect of discovery on continuation of proceedings—R.S.C., Ord. 65, r. 11. Legal Aid—Costs—Solicitor's liability—Proceedings improperly continued.

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March 25,
26, 27.

Sachs J.

Unreasonably to initiate or continue an action when it has no or substantially no chance of success may constitute conduct attracting an exercise of the jurisdiction of the court to call upon solicitors personally to pay costs which have been incurred in a suit. The mere fact that litigation fails is no reason for invoking that jurisdiction, nor is an error of judgment, nor even the mere fact that an error is of an order which constitutes or is equivalent to negligence. There must be something that amounts to a dereliction of duty. It is not, however, necessary to establish mala fides. Although the jurisdiction is one to be exercised sparingly, that cannot affect the duty of the court in its discretion to protect litigants from being improperly damnified.

Generally speaking, there is no reason in principle why the fact that the solicitor is acting under a civil aid certificate should make any difference, although the relevant factors are in such circumstances thrown into more prominence and there might also be exceptional cases where a certificate had, for example, been improperly obtained or litigation unreasonably continued.

In view of the special factors involved in proceedings under section 23 of the Matrimonial Causes Act, 1950, especially as regards the initiation of such proceedings, those who put in motion such proceedings, and not least any solicitor concerned, should be properly cautious before so doing, and should ascertain if possible beforehand from the husband the appropriate information as to

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his income and inescapable liabilities. To few proceedings is the axiom that it may become obvious on discovery that litigation not improperly initiated is bound to fail more applicable than those taken under this section.

A husband left the matrimonial home at the end of November, 1956. On December 11, 1956, the wife was granted a civil aid certificate to take proceedings under section 23 of the Matrimonial Causes Act, 1950, and an originating summons was issued on January 4, 1957. Although the wife was still living in the matrimonial home with the child of the parties, and was receiving certain financial benefits, no preliminary inquiries had been made of the husband's solicitors for information as to his true income and inescapable liabilities with a view to diminishing the risk of litigation proving necessary. The wife was, however, advised favourably by counsel on February 7, 1957, as regards the financial aspects, after considering an affidavit of the husband's disclosing an income of some £1,567 a year less a mortgage interest of £150, an endowment policy of £240 and upkeep of the home at £160. Orders for discovery were made and inspection took place in April, 1957. The wife's solicitors requested three copies of each of a large number of documents which were delivered on May 10, 1957, at a cost of over £64.

In May, 1957, the husband's solicitors wrote to the appropriate area committee submitting that there was on the facts no justification for the proceedings to continue. After the wife's solicitors had appeared *ex parte* before the area committee the certificate was allowed to remain in force.

The matter was heard upon oral evidence in October, 1957, following a last-minute conference with counsel, and after a two-day hearing the summons was dismissed:—

Held, (1) that it would be inappropriate in the present case to order the solicitors (upon whose personal honesty no imputation was made) to pay costs *ab initio* in view of the absence of any previously reported observations as to the propriety of making preliminary inquiries before issuing an originating summons in a case of this nature, and in view of the solicitors' ignorance at that stage of the husband's true financial position.

(2) That once there had been discovery, however, it should have become obvious that the wife would be unable to establish her case of wilful neglect to maintain as at the date of her summons (whatever effect any later change in financial arrangements might have had in any subsequent proceedings), and the solicitors should, accordingly, pay to the husband his party and party costs as from the beginning of August, 1957, when the summons for directions was issued.

Myers v. Elman [1940] A.C. 282; 56 T.L.R. 177; [1939] 4 All E.R. 484 applied.

(3) That the fact that the area committee had allowed the civil aid certificate to continue after the solicitor had personally and *ex parte* addressed it offered him no protection against the husband's claim (whatever effect it might have had upon a legal aid taxation). Such proceedings neither were nor were they intended

to constitute any sort of trial or other process affecting the rights of an opposing party, and the opinions expressed were no more admissible in evidence than those of other extraneous persons. For a number of generations solicitors had been given special and indeed generous cover when they obtained the advice of properly instructed counsel. It was neither necessary nor permissible to provide a proliferation of further umbrellas.

Hollington v. Hewthorn & Co. Ltd. [1943] K.B. 587; 59 T.L.R. 321; [1943] 2 All E.R. 35 applied.

Ingram v. Ingram [1956] P. 390; [1956] 1 All E.R. 785 distinguished.

(4) That, in the circumstances of this case, the action of the wife's solicitors in requesting such voluminous copying of documents amounted to a flagrant case of wasteful procedure, and the solicitors must pay the costs of the expenses thereby caused to the husband over and above the amount found reasonable in the registrar's report.

APPLICATION as to costs against a wife's solicitors arising out of proceedings under section 23 of the Matrimonial Causes Act, 1950, in which the wife was an assisted person.

The husband and wife were married in 1946 in Belgrade, the wife being a Yugoslav by birth. There was one child of the marriage, a girl, born in September, 1954. In 1955 the husband acquired a matrimonial home, purchasing the freehold by aid of mortgage and upon the footing that he took out an endowment insurance policy. There he lived with his wife and the child of the marriage. Whilst there the wife, who had no means of her own, received £5 10s. per week from the husband and was entitled and did charge the accounts of the husband at Messrs. Barkers and Messrs. Whiteleys for purchases averaging some £2 a week.

In September, 1956, after a quarrel during which the husband had for the first and only time spoken of closing those accounts (although he did not do so, and there was never any fear he would if they were used reasonably), the wife consulted solicitors about her marriage and, among other matters, raised that of money, telling the solicitor the kind of sums which she was charging against the accounts with the stores. The solicitor advised her to increase her purchases on those accounts: he did not suggest that she should tell her husband. In fact, she did not tell her husband but increased her charges on the accounts to sums which amounted in October, 1956, to £57, in November, 1956, to £45, and in December, 1956, to £32, an average of some £10 per week. In effect, the wife and child during the quarter ending December

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31, 1956, had benefits in cash and kind to a total of some £277 out of the husband's available £400.

On October 8, 1956, the wife's solicitor had an interview with the husband. The entry on the cost sheet reads: "attending Mr. Edwards at our office from 11 a.m. to 12.15 and discussing with him thoroughly the question of his domicile at the time of his marriage to Mrs. Edwards, when we formed the opinion that it is almost certain that domicile is in Yugoslavia. Generally discussing the difficulties with him between him and his wife, with particular regard to maintenance, when at the end of the interview he said he would think about what we had said and would probably ask his solicitor, Mr. Kershaw, to contact us within a fortnight or so." The note did not refer to any suggestion having been made, or discussion having arisen, as to whether the husband might wish to confess to adultery.

The solicitor on that occasion did not tell the husband of the increased sums being charged against the accounts. The inference was drawn by the court that the wife and her solicitor were both being careful not to inform the husband about the increased charges, a policy in which they were assisted by the fact that the accounts only came in a very long time after the charges were incurred.

There was a conflict of evidence between the husband and the wife's solicitor as to what was said on October 8, 1956, and the court accepted the husband's evidence on this point. The husband, in fact, did not cause his own solicitor to get into touch with his wife's solicitor; but on October 30, 1956, he informed him by telephone that he was not prepared to admit adultery and that it was left to the wife to take what action she thought fit. The court found that it appeared that up to that time the financial issues were obviously subsidiary. Questions of the validity of the marriage and the possibilities of a divorce were matters which had loomed large. Without any further communication with the husband or the solicitor whom the husband had mentioned, there was forwarded to the legal aid committee on November 6, 1956, an application by the wife for legal aid in section 23 proceedings. At the end of November, 1956, the husband left the matrimonial home. On December 11, 1956, a civil aid certificate was granted to the wife. On December 13, 1956, without further inquiry, the wife's solicitors wrote to Messrs. Kershaw a letter which contained this paragraph: "We believe that you have been told that our client proposes to apply to the court under section 23 of the Matrimonial Causes

" Act, 1950, and perhaps you will kindly confirm that you have
 " instructions to accept service of these proceedings on your
 " client's behalf. In the meanwhile we enclose herewith for your
 " information Form 6 " [which relates to legal aid]. Messrs.
 Kershaw replied on December 17, 1956, by a letter which included
 the phrase: " You will appreciate that we must obtain his
 " instructions to accept service of the contemplated proceedings."

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The following day the wife's solicitors wrote a letter which
 was considered likely by the court to give the impression that
 the solicitors who wrote it not only did not desire to discuss the
 matter in the usual way but were really anxious to embark on
 litigation.

The originating summons under section 23 was issued on
 January 4, 1957. On that day the wife, who continued to reside
 at the matrimonial home, swore an affidavit which stated that the
 husband's income from his B.B.C. appointment was believed to
 be at least £1,250 per annum, and that the wife estimated his
 journalistic income at not less than £250. She stated that the
 husband owned the freehold of the matrimonial home. She did
 not refer to the mortgage on it, or to the endowment policy,
 though her solicitor was aware of the existence but not the
 amount of those expenditures. In referring to her own position
 the wife mentioned the fact that she had during the past few
 months increased the sums which she had charged against the
 two stores accounts. " On the advice of my solicitor I spent a
 " little more, amounting to possibly £3 10s. per week on the two
 " accounts together,"—an inaccurate statement, as she had been
 spending on average £10 per week.

On January 23, 1957, the husband swore an affidavit stating
 that as from October, 1956, his B.B.C. salary had been £1,430
 per annum, and giving an average of £100 per annum for his
 income from journalistic activities. He set out the position as
 regards the matrimonial home and the expenditure in connexion
 therewith. He stated that the freehold was subject to a mortgage
 of £2,860 secured on the house and an endowment policy. The
 mortgage interest was set out as being £150 per annum and the
 policy premium £240 per annum. He further stated that he paid
 the outgoings of the matrimonial home amounting to approxi-
 mately £160 a year. Those figures were never challenged.

On February 1, 1957, the wife swore a further affidavit in
 which she put the respondent to proof as to his income over the
 past three years, and as to his capital assets of all kinds, including

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the values of his life policies, bank accounts, stocks and shares and bonds, and further put him to proof as to the rent paid by him at [his then address].

On February 7, 1957, counsel for the wife, having been asked to advise on evidence and generally, gave a written opinion mostly concerned with issues other than the question of the sufficiency of the financial provisions being made by the husband, but also dealing briefly with that point and with questions of discovery. He advised favourably as regards the question of what were the wife's prospects in relation to the financial point.

On February 15, 1957, orders for mutual discovery were made, the wife being represented by counsel.

On March 29, 1957, the husband filed an affidavit of documents which, at the request of the wife's solicitors, he supplemented on April 5, 1957. On April 15, 1957, the wife's solicitor inspected the documents disclosed. This inspection took two to two and a half hours. He then made a demand for three copies of each of a mass of documents. These were delivered to him on May 10, 1957, at a charge of £64 11s. 6d.

On May 17, 1957, the husband's solicitors, who considered that there was no justification for these present proceedings which were bound to involve their client in considerable costs, wrote (and the court held that they were fully entitled to do so) a letter to the area committee. On May 23, 1957, the wife's solicitor attended before the committee. The legal aid certificate thereafter remained in force.

On July 12, 1957, he had a three-hour conference with the wife, who was then in hospital, mainly relating to documents such as the two accounts. On August 14, 1957, the wife came out of hospital and at about that time a summons for directions was issued by the wife which was heard eventually on September 20, 1957, when the parties were given leave to supplement their affidavits by oral evidence. On October 8, 1957, the wife's solicitor had the case entered for trial because her mother was due later in the month to leave for Yugoslavia, and October 18, 1957, was fixed for the hearing. On October 15 and 16, 1957, the solicitors delivered to counsel the papers which constituted his brief. The papers were sent down in two lots, and there did not appear to have been an analysis of the figures, etc., involved; counsel advised orally in the matter at an eve of the hearing conference and did not advise in the circumstances and on the materials before him that proceedings should be stayed.

On October 20, 1957, the originating summons came into the

list and was called on for hearing first on that day. In due course it transpired that in substance the only figures over which there was really a conflict were, first, as to the husband's earnings from journalism in the one year, namely, 1956-57; secondly, as to what really were the amounts he was being called upon to pay off from his bank overdraft; and thirdly, what were the monthly totals of the sums the wife had charged the above two accounts after receiving advice from her solicitor.

The court found that if the wife's legal advisers had acted reasonably in checking and not disputing figures which could not properly be disputed, and if they had troubled to ascertain what exactly the wife had charged monthly against these two accounts, a single court day would have sufficed to dispose of the matter; but that a course was taken which included, no doubt on instructions, cross-examination on materials which had not been properly analysed. The matter took two full days, and on October 21, 1957, the application was dismissed, it being held that on the facts it was quite hopeless to argue that in the period preceding the issue of the summons there was any wilful neglect to maintain the wife.

On October 22, 1957, Mr. Ormrod, for the husband, made applications for costs to be paid personally by the wife's solicitors. The matter was referred to the registrar for a report relating to unnecessary expenses caused to the husband, which was made by Mr. Registrar Wilkinson after bills of costs had been lodged, and which was amplified by a supplementary report setting out in monetary terms the respective effects of accepting or rejecting the main substance of the report, with its findings of unnecessary expenses brought upon the husband, in order to obviate the necessity of incurring further costs after the present hearing if any order came to be made on one of the lines asked for by Mr. Ormrod. The difference in the two amounts was £43.

Even without the costs of and occasioned by the copying of documents which it was contended was unnecessary, the proper costs of the husband on a party and party basis up to the conclusion of the hearing on October 21, 1957, were found by the registrar to amount to some £108 up to August 1, 1957 (immediately before the summons for directions), and to some £105 thereafter until and including October 21, 1957 (the date the originating summons was dismissed). Those of the wife on a solicitor and client basis amounted to some £320, but those costs included items relating to certain issues not dealt with at the hearing of the summons.

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John Latey Q.C. and *J. T. Stephenson*, who did not represent the wife in the proceedings upon the originating summons under section 23, for the solicitors acting for the wife in those proceedings. Although it is conceded that some of the documents need not have been copied and included in the bundle, this is a case where the motives of the solicitor were innocent and proper and there was no more than an error of judgment in difficult circumstances; he ought not, therefore, to be ordered to pay the husband's costs relating to the documents. Should the court, however, be against the solicitor in respect of the documents, the matter should be dealt with on a broad basis.

In considering whether the solicitor should pay the husband's general costs the test to be applied from *Myers v. Elman*¹ should be: ought a solicitor, acting as an ordinary prudent solicitor at the time when the documents, for example, came into his possession, have decided, not that his client had a reasonable prospect of success or that he had equal chances, but that he had no chance of success at all? Had the solicitor indeed been guilty of a gross neglect amounting to something in the nature of professional misconduct or sharp practice? In deciding that issue, all circumstances must be taken into account, including, in the present case, factors which must have weighed with him, including counsel's opinion and the fact that the area committee, after considering the matter, had decided that the certificate should be allowed to continue.

[SACHS J. But to decide what weight the solicitor should reasonably have placed upon the decision of the area committee would it not be necessary first to know upon what material that committee had acted? It would seem from *Hollington v. Hewthorn & Co. Ltd.*,² moreover, that the decision of the area committee, made on an ex parte application, may be in effect irrelevant, being the decision of a distinct and different body.]

The decision in *Hollington v. Hewthorn & Co. Ltd.*² concerned, in an action for negligence, the finding of a different court which had arisen upon a prosecution for careless driving; the issue was not identical, and the first decision was accordingly held irrelevant.³ But the question here is whether a prudent solicitor can properly take into consideration a decision of this nature by an area committee when deciding whether it would be

¹ [1940] A.C. 282; 56 T.L.R. 177;
[1939] 4 All E.R. 484.

² [1943] K.B. 587; 59 T.L.R. 321;
[1943] 2 All E.R. 35.

³ [1943] K.B. 587, 595.

proper for him to continue with the proceedings. The committee's decision should not, therefore, be excluded. The weight of the committee's decision must in part depend upon the material placed before it. One is very conscious of the undesirability of an investigation by the court into the details of the area committee's deliberations, save in exceptional circumstances.

Roger Gray (*Roger Ormrod*, who had appeared at the hearing of the originating summons under section 23 and had made application on October 22, 1957, that the husband's costs be paid personally by the wife's solicitor, with him) for the husband. Further evidence from the area committee should not be called, partly because under *Hollington v. Hewthorn & Co. Ltd.*⁴ its finding is strictly irrelevant, and partly because that finding, though possibly not entirely irrelevant to the solicitor's state of mind, is not a factor of importance upon the present issue. It is not suggested that the solicitor deliberately sought to mislead the committee, although as matters now appear no court could, it is submitted, have reached a decision favourable to the wife. But it is not necessary upon *Myers v. Elman*⁵ to establish misconduct on the part of a solicitor before the jurisdiction to order him to pay the costs can be invoked, and it is submitted that the facts in this case are such as to entitle the husband to invoke that jurisdiction.

R. H. W. Dunn (who did not represent her in the proceedings upon the originating summons) for the wife.

John Latey Q.C. If the test in *Myers v. Elman*⁵ is whether the conduct of the solicitors amounted to gross negligence, the opinion and advice of counsel concerned must be an important factor. In this case counsel had advised favourably in writing at the early stages and orally shortly before the hearing.

[The court then heard evidence from the counsel concerned as to the opinion and advice he had given, privilege being waived. Evidence was also heard from the solicitor concerned.]

The jurisdiction to order a solicitor to pay costs is one which should be exercised sparingly. [*Myers v. Elman*⁵ was referred to.] A dereliction of duty, or negligence or neglect, are not of themselves sufficient; there must be gross negligence.

[SACHS J. referred to the words of Lord Maugham used in this context—"a serious dereliction of duty."⁶]

Such a matter should be considered in two stages, first, has there been gross negligence or "a serious dereliction of duty,"

⁴ [1943] K.B. 587.

⁶ Ibid. 292.

⁵ [1940] A.C. 282.

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and, secondly, if such be established, in what way should the court exercise its discretion in the particular circumstances of the case? That discretion should be exercised sparingly; a mistake or error alone should not be sufficient, and a dereliction of duty must be grave.

Applying those principles to the present case, (1) there is no suggestion of dishonesty, chicanery, or sharp practice, and the court should, therefore, be doubly cautious before making an order which may have serious repercussions on the solicitor's professional position; (2) the decision to continue should not be taken as more than an error of judgment, and it is relevant that it is never easy to assess the results of any contested issue. Counsel's opinion and advice were favourable, as his evidence shows, and the relevance of such an opinion in considering a solicitor's conduct of proceedings is clear from *Francis v. Francis and Dickerson*.⁷

The area committee had considered a letter from the husband's solicitors in reaching their decision, and the court should consider, as in *Ingram v. Ingram*,⁸ the impact upon the wife's solicitor of the decision of the committee, for as the evidence of a conviction in *Ingram's* case⁸ was held relevant because of its impact on the petitioner's mind, so the impact of the committee's decision should similarly be considered here. It is submitted that the joint effect of *Hollington v. Hewthorn & Co. Ltd.*⁹ and *Ingram v. Ingram*¹⁰ is this: when the issue to be decided by the second tribunal is one of fact, in which the question of the impact of the decision in the former proceedings on the mind of a party involved is irrelevant, that decision will itself be irrelevant in the second proceedings; but where, as here, the issue before the second tribunal concerns matters in which the impact of the decision of the first tribunal must affect one of the parties in the later proceedings, the first decision is relevant and, accordingly, admissible.

The issue here, therefore, is: what can be held properly to move the mind of an ordinary solicitor or member of the Bar? Can the opinions of his colleagues, or general experience (and it is considered that the objective test in this particular jurisdiction as to costs may not, therefore, be the correct one) be taken reasonably into account? Or the views of an area committee with its statutory authority and the experience of its members? It

⁷ [1956] P. 87; [1955] 3 All E.R. 836.

⁸ [1956] P. 390.

⁹ [1943] K.B. 587.

¹⁰ [1956] P. 390.

would be reasonable for a solicitor to give weight to such matters, and it would be unreasonable in such circumstances to convict him of gross neglect or serious dereliction of duty if he did so. If weight cannot be given by solicitors to the views of area committees, it would open up a field of very great difficulty; and it is relevant that, if counsel's opinion were taken more than once or twice in civil aid cases, the fee might be disallowed upon taxation.

In view, therefore, of the decision of the area committee, the opinion and advice of counsel, and the imponderables of litigation, it is submitted that the application against the solicitor, who had at worst acted over-zealously, should be dismissed. [Reference was also made to *Tulip v. Tulip*.¹¹]

Roger Gray in reply. The solicitor should either pay the whole of the costs or the costs incurred after discovery. The advice of counsel was not given upon the true facts but upon an incomplete estimate of means, and, if his opinion is to be relevant, it must be given upon proper instructions. A further opinion should have been taken directly the new facts came to light on discovery, and the advice of properly instructed counsel is to be preferred to the view of a committee who may not have had all the facts before them.

SACHS J. stated the facts substantially as set out above and continued: The claims made in the course of Mr. Ormrod's applications were that the wife's solicitors should be held personally liable to the husband for all the costs of the present proceedings, having regard to their lack of any reasonable chance of success and the way in which they were initiated and conducted; alternatively, that they ought thus to be liable for the costs after completion of discovery, when the lack of such chances became even more apparent; and in the further alternative that they should in any event pay the costs of and arising out of the copying of unnecessary documents, regard being had to the provisions of R.S.C., Ord. 65, r. 20.

The pages in the various bundles numbered over 300 and in some of them there were photostats of quite a number of documents. They included one bundle of 110 pages never used at trial, and this and another one which was also not used at trial were submitted to constitute fantastic bundles.

In addition, it became relevant to consider whether any

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¹¹ [1951] P. 378; [1951] 1 T.L.R. 1056; [1951] 2 All E.R. 91.

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guidance should be given to the registrar as regards the costs which the wife's solicitor claims under the legal aid taxation, both in so far as these arose out of copying which attracted the provisions of R.S.C., Ord. 65, r. 20, or out of any other of the matters of complaint particularized on October 22, 1957, under the informal procedure referred to in *Myers v. Elman*.¹

It is convenient first to deal with the question of the documents, their copying, and the costs that arose out of this aspect of the case.

I do not propose to deal in detail with the various factors affecting this portion of Mr. Ormrod's application, but one of them does need mention as it shows something of the general attitude adopted in the conduct of this case. The solicitor for the wife has stated that by June or July, 1957, he was, after examining the documents, aware that there would be no dispute as to what sums the husband had in fact paid annually in regard to the outgoings of £160 for rates, fuel, light, etc., referred to in the husband's affidavit of January 23, 1957; and in fact none of these items were disputed at trial. Yet though he had the conduct of the proceedings the solicitor for the wife did not inform the husband's solicitor of the fact that these figures were agreed as such. On the contrary, on October 15, 1957, he caused all the documents relating to this type of expenditure to be included in the court bundles and numbered. It was with the aid of documents relating to that type of expenditure and to other irrelevant matters that one bundle came to have 110 unused and unusable pages numbered and placed with counsel's briefs. A more flagrant case of wasteful procedure is not easy to think of and it serves to show how costs were run up without regard to propriety.

Similar comments are applicable to documents relating to expenditure on mortgage interest and other undisputed items.

On this part of the case I have the very valuable assistance of the report of a particularly experienced registrar. It was a report made after a full hearing. The wife's solicitor, however, has in the course of the present hearing before me re-stated in evidence at some length the same facts as were put before the registrar and then caused to be submitted that almost every line—certainly every other line—in the effective part of the report is to be treated as being erroneous. [His Lordship considered that evidence and continued:] I adopt broadly and without hesitation the registrar's

¹ [1940] A.C. 282, 318.

report with its careful and detailed findings. Equally I accept his supplementary report on detailed items.

I was invited by Mr. Latey to deal with this portion of the matter in a final way on a broad basis. I would myself have made some further adjustments on the footing that if conducted in the way that I have indicated the case would have been concluded in a single court day: but here again it seems proper to adopt the report of one who has such wide experience. The result is that whatever may be the conclusions reached on the other issues raised on behalf of the husband, the wife's solicitors must pay to him the £43 referred to in the supplementary report.

My *prima facie* view is that this acceptance of the registrar's report of itself would lead to an order that the solicitors should pay one-third of the costs of October 22, 1957, all the costs of the hearing before and the report of the registrar, and having regard to the reopening of the issues by evidence on March 25, 1958, two-fifths of the costs relating to the present hearing. In addition I record my view that as regards the taxation of the wife's bill the registrar's findings in relation to reductions he would make in her bill as given in the supplementary report in my opinion proceed on the proper basis to be applied.

There now falls to be dealt with the main application made on behalf of the husband—that the solicitors for the wife should be personally called upon to pay all the costs of the husband or, alternatively, those costs which he incurred after discovery. This application raises matters of serious import, particularly as there appears to be no previous authority in relation to an application of this kind made against a solicitor acting for an assisted person.

The jurisdiction invoked is that discussed in *Myers v. Elman*,² where its origin and nature are explained in the speeches of Viscount Maugham,³ Lord Atkin⁴ and Lord Wright.⁵ It is there made clear that the jurisdiction is one that the court by virtue of its inherent powers exercises over solicitors in their capacity of officers of the court. The relevant duty of the solicitor covers "all those against whom they are concerned," *per* Lord Maugham.⁶ It is a "duty owed to the court to conduct litigation "before it with due propriety," *per* Lord Atkin.⁷ The conduct complained of must, before it attracts the above jurisdiction, be

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² [1940] A.C. 282.

³ *Ibid.* 289.

⁴ *Ibid.* 302.

⁵ *Ibid.* 317.

⁶ *Ibid.* 290.

⁷ *Ibid.* 302.

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such as to "involve a failure on the part of a solicitor to fulfil "his duty to the court to aid in promoting in his own sphere the "cause of justice," *per* Lord Wright.⁸ The jurisdiction is exercised not to punish the solicitor but to protect and compensate the opposite party.

It is, of course, axiomatic, but none the less something which in the present case should be mentioned, that the mere fact that the litigation fails is no reason for invoking the jurisdiction: nor is an error of judgment: nor even is the mere fact that an error is of an order which constitutes or is equivalent to negligence. There must be something that amounts, in the words of Lord Maugham,⁹ to "a serious dereliction of duty," something which justifies, according to other speeches in that case, the use of the word "gross." It is not, however, normally necessary to establish *mala fides* or other obliquity on the part of the solicitors; though it may be that if *mala fides* is established that might turn the scale in a particular case: and it is right at this stage to make it clear that no imputation whatever is made against the solicitor's honesty.

No definition or list of the classes of improper acts which attract the jurisdiction can, of course, be made; but they certainly include anything which can be termed an abuse of the process of the court and oppressive conduct generally. It is also from the authorities clear, and no submission to the contrary has been here made, that unreasonably to initiate or continue an action when it has no or substantially no chance of success may constitute conduct attracting an exercise of the above jurisdiction.

Mr. Latey submitted in the course of his most helpful address that once a sufficient degree of dereliction of duty is established, the exercise of the above jurisdiction was a matter of discretion, and I accept that view. I also agree with his submission that the jurisdiction is one to be exercised sparingly and that the court can to some extent bear in mind the repercussions of making an order. On the other hand, that cannot affect the duty of the court to protect litigants from being improperly damnified. Suffice it to say that any application made to the court in relation to this jurisdiction is naturally one which causes anxious scrutiny of all the circumstances.

I now turn to the question whether the fact that the solicitor is acting under a legal aid certificate affects the position. Generally speaking, I can see no reason in principle why that

⁸ [1940] A.C. 282, 319.

⁹ *Ibid.* 292.

should make any difference. Further, it is to be noted that section 1 (7) (b) of the Legal Aid and Advice Act, 1949, provides that save as set out in the Act or regulations made thereunder "the rights conferred by this Part of this Act on a person receiving legal aid shall not affect the rights or liabilities of other parties to the proceedings or the principles on which the discretion of any court or tribunal is normally exercised." To my mind that provision applies to issues of the type now before me.

Of course, where the lay client has been granted a certificate under which he is either making no or no substantial contribution, that demonstrates that that client may well have little if anything to lose if the proceedings fail; that in all probability the opposing party, assuming him to be unassisted, will even if successful have to bear his own costs without any real prospect of recouping them; and that the more the prospects of success diminish the greater become the chances that no one will benefit from the litigation except those retained to conduct it. But that means no more than that factors which may occur in any litigation are thrown into more prominence when the lay client is receiving legal aid, and that accordingly the solicitor to the assisted person is to that extent put on automatic notice that there is or may come into being, a situation that needs careful watching to see that the litigation is conducted with the due propriety to which Lord Atkin referred. That this notice is widely acted on by the legal profession is well known.

I have used the words "generally speaking" in relation to the lack of difference as regards legal aid cases, partly because there may be exceptional cases. Thus the fact that the solicitor had been intentionally instrumental in improperly obtaining a legal aid certificate might of itself give rise to special considerations, or these might arise if, for instance (as happened in one case), the solicitor even unintentionally omitted to inform the certifying committee of an obviously vital fact such as a previous adverse decision of an appellate tribunal between the same parties on substantially the same facts. It was, however, no part of the case made on behalf of the husband or in his applications that the wife's solicitor acted improperly in furthering the application for or continuing of the legal aid certificate, and the present case falls to be decided without reference to what might be the effect of such exceptional considerations. A second reason for using the words "generally speaking" relates to the special provisions of the regulations which refer to cases where it becomes unreasonable to

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continue the litigation, a matter to which further reference will be made later.

Before examining further the facts of this particular case it is, having regard to the infrequency of applications such as the present, proper to say that their very rarity is of itself an implicit tribute to the high standard adopted by those concerned to implement and act under the legal aid system.

The issue next to be decided is whether the wife's solicitors were in such grave fault in initiating the proceedings at the time and in the manner which this was done as to make it right that they should bear the costs of so doing.

First, however, it is to be observed that this is not an ordinary action which is being considered: it is a form of proceedings involving certain special factors, especially as regards its initiation. A plaintiff seeking judgment in debt or damages has to get the case on its feet by admissible evidence. A wife applying under section 23 of the Matrimonial Causes Act, 1950, can, however, by an affidavit stating what in truth may be no more than an optimistic belief "put the husband to proof" of his income and assets, and can thus without having further to rely on affirmative admissible evidence cause him great inconvenience and the expenses of discovery, and can also have him cross-examined in court. This standard practice as regards "putting to proof" is exemplified in textbook precedents—compare Rayden on Divorce, 7th ed., at pp. 1244/5—and in the wife's affidavits in this case. It stems from, and is necessary by reason of, the difficulties a wife often has in testifying accurately to her husband's income. It results, however, in the court's process having something of an inquisitorial element.

Further, a plaintiff who fails in an ordinary action is normally ordered to pay costs, but a husband not only has to pay the costs of a successful applicant, but may also on occasion be ordered to pay those of an unsuccessful wife. In any event, unless the wife has appropriate assets, he is not normally awarded costs where the applicant fails. So by the type of affidavit I have mentioned he is put to the peril of considerable expense.

This procedure can of its nature be liable to abuse: and danger of abuse has not diminished since the Legal Aid Act, 1949, has enabled wives to press forward with their applications with greater ability to pursue the litigation to its end. It is accordingly right that those who put in motion the above procedure, and not least any solicitor concerned, should be under a duty to be properly cautious before so doing.

It is thus not unexpected to find that, in accordance with the reputation of their profession for honourable conduct, solicitors of standing when acting for wives have made it their normal practice in cases such as the present, where the wife has possession of the matrimonial home and is in receipt of regular sums from the husband, to seek from the husband's solicitors, before starting proceedings, appropriate information as to that husband's income and inescapable liabilities—so as to diminish the chances of starting litigation which may prove to be unnecessary or oppressive. Indeed, the wife's solicitor said that this was the invariable practice of his firm and, so far as I could understand him, gave no reason for failing to take that course on this occasion. Thus, to my mind, it seems that a solicitor who in such circumstances fails, without some overriding reason, to conform to the above practice can hardly be surprised if complaint is made against him.

What happened in the present case was that the solicitor for the wife had a long interview on October 8, 1956, with the husband, and later had the telephone communication from him on October 30, 1956, which was first referred to when the solicitor gave evidence for the second time. I am not at all happy as to having been given a full account of what happened on the earlier date. Suffice it to say that my preference for the husband's evidence as to it as expressed at the original hearing has now been reinforced by the appearance of the costs entry of October 30, 1956.

It is clear that the money aspect on October 8, 1956, was then, as he said, a subsidiary one: and that though the solicitor indicated his client's lack of satisfaction with her financial position, it was never made sufficiently plain to the husband that this was going to be the subject of litigation, far less that he was expected to provide information as to his means. I must also refer again to the fact that although the wife's solicitors knew that Messrs. Kershaw might well be acting for the husband, and so assumed, no letter was written to that firm before the one which, on December 13, 1956, asked them whether they would accept service of the proposed proceedings. It is thus apparent that no inquiries were made with a view to eliciting information as to the husband's financial position—and that despite the wife's solicitors being aware that there was a mortgage on the matrimonial home, and that the husband was under a necessity to pay policy premiums in connexion with an insurance relating thereto. Further, no attempt was made to secure documents to check what were the actual increased amounts which

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the wife had, after receiving advice, been surreptitiously charging to the two accounts.

In view of the statement by the wife's solicitor as to the inquiries that were, according to the normal practice of his firm, invariably made in this sort of case, it is hard to understand why none were embarked upon during the six weeks that followed October 30, 1956. Further, the letter of December 18, 1956, was written in a strain which was to bedevil much of this litigation and which was hardly likely to assist the interests of reason. Moreover, it is the fact that if proper inquiries had been made and appropriate answers given, it would have become extremely difficult to say that there was any reasonable chance of success for a summons issued in December, 1956, or January, 1957.

In the above circumstances it is hard to come to any conclusion but that the commencement of the litigation at that time and in that manner was unreasonable.

On the other hand, there had not been previously any reported case in which the distinction between section 23 proceedings and an ordinary action had been referred to; so the propriety of making certain inquiries in cases such as the present may not perhaps have been appreciated in its true light. Until the solicitor actually knew the figures of the husband's inescapable expenditure, the paucity of chances of success would not be easy to apprehend, and it may be that without guidance of the type above referred to a solicitor might have thought he was entitled to strike before making inquiries of the husband. Taking this factor into account I am not prepared to hold that the solicitor's action at this stage was such as to make it right to order him to pay the costs *ab initio*.

Accordingly, it becomes unnecessary to consider the effect in relation to the period up to the end of January of counsel's advice given on February 7, 1957. Nor is it necessary to consider submissions on behalf of the husband as to how the absence of certain material, which could with reasonable diligence have been placed before counsel, might have affected the cover it gave to the instructing solicitors.

The next question is whether at some stage in the proceedings it became plain, on the material available, that it had no prospects of success which would justify its continuance.

It is axiomatic that on discovery it may become obvious that litigation, originally not improperly initiated, is yet bound to fail. It is one of the best known duties of a solicitor to examine

closely whatever is disclosed upon his opponent's affidavit of documents to see whether the relative prospects of success or failure have been altered thereby. To few proceedings is the above axiom more applicable than those taken under section 23 of the Matrimonial Causes Act.

As regards legal aid proceedings it is to be noted that section 1 (6) provides as follows: "A person shall not be given legal aid in connexion with any proceedings unless he shows that he has reasonable grounds for taking, defending or being a party thereto, and may also be refused legal aid if it appears unreasonable that he should receive it in the particular circumstances of the case." Further, it is well known to both branches of the profession that there are special provisions in the Legal Aid (General) Regulations, 1950, to ensure that solicitors are in a position to cease acting in litigation when once it becomes apparent that the chances referred to in the above section 1 (6) no longer exist. So in such proceedings there is nothing to necessitate their continuing to conduct them when once such continuation becomes unreasonable. A fortiori if the chances of success become non-existent or virtually non-existent, it becomes difficult to see how it can remain justifiable to continue to put the opposing party to increasing costs.

Now the present case is a classic one of a change in position on discovery. Not only did hope of challenging the essential outgoing expenditure (£637 per annum) vanish, but it became visible that the wife had been charging on the accounts not an average of £3 10s. per week but of £10 per week for the three months before the summons was issued. In addition there had been disclosed documents relating to the receipts from and income tax returns as to the husband's journalistic earnings. Further, on May 17, 1957, the solicitors for the husband by their letter to the area committee as transmitted to the wife's solicitor had put the latter on guard. The position cried aloud for careful appraisal in the light of proper and sufficient analysis of the documents disclosed on discovery. For it is elementary that the "wilful neglect" to maintain must be established as at the date the proceedings start, it is elementary that the courts look at benefits received by the wife in kind as well as in cash, and it is elementary that the court has regard to the inescapable financial commitments of the husband.

The wife's solicitor says that he was seriously concerned; and it is quite clear that by May 23, 1957, he not only ought to have known, but in fact did know, enough to realize that there had been

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an important and adverse change in the prospects of success. But what was done was not to make the appropriate analyses of what appeared from all the documents—that never seems to have been done—nor to consult counsel. In fact he chose to go whilst in an angry mood to the area committee without any written submission, without, on his own evidence, having made the analyses, and without any advice from counsel. I am aware that on February 7, 1957, counsel in the brief way I have mentioned did deal favourably with the question of the wife's prospect of obtaining an order. But to rely on that in the circumstances as they arose in mid-May is not good enough; nor did I gather that the solicitor did rely on it at that stage; nor did Mr. Latey submit that he properly could.

He chose to form in an incensed frame of mind a strong opinion that there remained a good case and that he would proceed: no careful and considered appraisal with properly examined figures was ever made. Unfortunately the opinion thus formed by the solicitor was wrong. But it was worse than that. It was an opinion that a solicitor, examining the matter with the aid of proper use of the material I have mentioned, could not reasonably have reached once he had been into the situation with appropriate care.

The opinion indeed turned out, when the facts were analysed sufficiently, to be grossly wrong; chances of success did not really then exist at all. To come to that conclusion one has only to bear in mind the points I have referred to as being elementary, and then to examine the figures as stated in my judgment (where I found the wife was receiving for herself and the 3½-year-old child the benefit of £277 out of an available £400 or less in the last quarter of 1957), or those set out in the registrar's report, for anyone with knowledge of this Division's practice to appreciate that point. In parenthesis I should perhaps add that the above figure of £400 was arrived at before taking into account expenses, tax liability or the bank's demands for overdraft repayments, and that there was no sign of any sufficient windfall from journalistic earnings which could possibly so affect their average as to outweigh all the factors I have mentioned. Indeed, I feel sure that if counsel for the wife had ever been given a real opportunity for giving a reasoned opinion after having had the documents carefully considered and the figures appearing from them analysed, he could have come to no other opinion than that these proceedings were, to use a phrase of the husband's solicitors in their letter of May 17, 1957, "doomed to failure."

Further, there was another point which in itself called for a reconsideration of the situation at about this period. The accounts at Barkers and Whiteleys had been closed, albeit under the circumstances set out in the letter of May 17, 1957, where the wife's charging of the account with £33 16s. between March 27, 1957, and April 8, 1957, is stated to have brought the matter to a head. The wife thus, by the end of May, appears to have been receiving £5 10s. per week and no more, and was in a worse physical condition than previously. This was quite a different situation to that obtaining immediately before the issue of the summons on January 4, 1957. Clearly there fell for consideration in those circumstances whether there should not be taken out a further summons alleging wilful neglect to maintain as at this later date; and in conjunction with that there would have naturally to be considered the question of discontinuance of the earlier proceedings. Any experienced counsel would immediately have taken this question into account, and it would have been even more obvious that the continuance of the current proceedings should be abandoned. Although this point was alluded to in my judgment, the wife's solicitor did not suggest in his further evidence that any thought of this nature had crossed his mind, and I am left to conclude that it did not occur to him.

Unfortunately, no such opinion of counsel was taken. The first time after discovery that counsel saw the papers was very shortly before October 18, 1957, the date fixed for the hearing. Then he got his brief and accompanying papers sent down in two lots (I was not told which came first), just in advance of a conference on October 16, 1957. It was not thought fit to let me see the contents of the brief, and all I can say is that even at this late stage counsel seems to have been left to make his own analyses, and the solicitor's estimate of the time properly needed to analyse all the papers he had had copied was something in the area of 30 hours. That is not the sort of way to get an opinion of the beneficial type to which I referred in *Francis v. Francis and Dickerson*.¹⁰

Moreover, the most substantial costs had been incurred, and their increase by fighting the case for the first day would be relatively small. The opportunities in relation to issuing a fresh summons referable to a later date of alleged neglect and returnable by the date fixed for hearing of the original summons had passed.

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¹⁰ [1956] P. 87, 90; [1955] 3 All E.R. 836.

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Counsel faced with such a position is in a predicament and may well find himself taking a line to which he would not have committed himself if given the sort of opportunity I have previously mentioned. It is symptomatic of this sort of position that at the hearing the court had difficulty in eliciting what figures were and what figures were not in dispute. This applied to several matters at various stages of the hearing but is best exemplified by the necessity the court was put to as regards eliciting that figures in a certain document as to journalistic fees (1954/5 £183 and 1955/6 £54) were not being challenged. To put counsel in the position of having to give a snap opinion in such a case when months had been allowed to pass after discovery invites comment. It could not produce any cover for the past and it was rightly not submitted to be something to be taken into account as regards the costs of the hearing.

The question thus arises as to the date at which the solicitor in charge of the wife's case ought to have concluded that the case should not continue. No detailed argument was addressed to me by either side as to which date should be taken between May 10, 1957, when the copies of the many documents arrived, and the first part of August, 1957, when the summons for directions was taken out. It seems hardly to lie in the solicitor's mouth to say that his attendance before the area committee on May 23, 1957, was on an occasion when he was not in a position to have made himself fully aware of the effect of discovery, although in fact I cannot see from his own evidence how by then he had confirmed to himself any of the figures with any accuracy; there is also much to be said for not adopting a date more than a month after May 10, 1957; but there is certainly no reason why he should not have taken all reasonable steps to inform himself or, alternatively, to get counsel's opinion by August 1, 1957.

One further point, and one of some general concern, remains to be dealt with. It was argued to be of importance that the area committee, after being informed by the husband's solicitors in their letter of May 17, 1957, that in the latter's view the proceedings could not succeed, took no step to terminate the legal aid certificate after having heard the wife's solicitor. On that fact it was sought to found the submission that the continuance of those proceedings by the wife's solicitors could not thereafter be held to be unreasonable in that he was entitled to rely and act on the fact that the certificate was not revoked.

To my mind such a submission cannot be sustained. The position between the Legal Aid Fund and a solicitor is one thing:

that between the same solicitor and an opposing party is quite different. Here, again, section 1 (7) (b) of the Legal Aid and Advice Act, 1949, shows that the rights of such other parties cannot be prejudiced by the fact that an opponent is receiving legal aid. Proceedings before a committee constituted under the Legal Aid and Advice Act, 1949, neither are nor are intended to constitute any sort of trial or other process affecting the rights of an opposing party. Further, as I think Mr. Latey agreed, it would seem most undesirable that on an issue such as is now before me there should be investigated exactly what took place and what was said before the area committee. The position might naturally have been different had the issue been raised that there was an improper procurement of legal aid which could of itself result in the court's inherent jurisdiction as regards an officer of the court being invoked.

Mr. Latey, by his submission, made it plain that what was really sought to be relied on was the opinion of the area committee. This opinion, expressed after having heard one side upon such materials as may be placed before it is, if properly obtained, conclusive as between the solicitor and the Law Society as regards the former's claims on the Legal Aid Fund. As between the solicitor and an opposing party it was naturally conceded by Mr. Latey not to be binding on the court: but I go further and hold that it is no more admissible in evidence than the opinion of any other third party: compare *Hollington v. Hewthorn & Co. Ltd.*¹¹

It was submitted that in the past few years solicitors have come to view with respect and to rely on the opinions of area committees or, to be exact, of their sub-committees because of the stature of those composing them. The argument proceeded that the impact of their decisions on the mind of a solicitor was relevant and that the same line of reasoning could be applied as that in *Ingram v. Ingram*,¹² a decision relating to a very special field, that of the relations between husband and wife. Once, however, it is realized that the area committee is not a judicial tribunal, that its decision is of necessity *ex parte*, that the person appearing on behalf of his client before the committee is the solicitor himself, and that much may depend on precisely what material and arguments he adduces, it becomes apparent how fallacious is the argument that such an opinion should be allowed to weigh to the disadvantage of the opposing litigant. The opinions of certifying committees, area sub-committees and area committees are

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¹¹ [1943] K.B. 587, 595; 59 T.L.R. 321; [1943] 2 All E.R. 35.

¹² [1956] P. 390, 403; [1956] 1 All E.R. 785.

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no more admissible in evidence than those of other extraneous persons on matters on which the court forms its own conclusions objectively and without expert evidence.

For a number of generations solicitors have been given special and indeed generous cover when they obtain the advice of properly instructed counsel. It is in my view neither necessary from the professional angle nor permissible in principle to provide a proliferation of further umbrellas.

It was urged that there could have been fears that the fee for consulting counsel might be disallowed on the legal aid taxation. In this particular case I cannot think that there was any prospect of such a disallowance. Apart from all other factors it would, having regard to the letter of May 17, 1957, from the opposing solicitors have been impossible to disallow the fee even on a party and party basis. I cannot accept that there was any real fear as regards this.

In the above circumstances I ruled against questions as to what was said to and by the area committee when the wife's solicitor attended. I also ruled against the question asking whether he relied on their opinion; but I permitted the latter question to be put *de bene esse* and that in turn led to the solicitor being similarly cross-examined on the point. I must accordingly record that I would find myself in considerable difficulty over accepting his evidence that in this particular case the decision of the area committee was a really material factor affecting his continuance of the litigation. At that stage he was much incensed with his opposing solicitor, determined not to abandon the proceedings, and probably unable to look at the position objectively. Having seen and heard him on this point I have regretfully concluded that he was probably in any event intending to carry on with this litigation on the strength of his own opinion.

It having been established that the solicitor's conduct was of that serious nature to which the speeches in *Myers v. Elman*¹³ refer, and that the matter is thus one in which there is jurisdiction to make an order against that solicitor, the question of discretion arises. It is urged that all that was done was intended for the benefit of the lay client. But, assuming that to be so, how can that justify oppressive procedure running the husband into ever-increasing costs? The jurisdiction of the court is intended to protect defendants from precisely that sort of oppression. To

¹³ [1940] A.C. 282.

my mind this is a case where the solicitor throughout was bent on pressing on with litigation regardless of all other factors.

In the earliest stages his disregard for other factors appears to some extent from the way he started proceedings after advising the wife to run up accounts without telling her to inform her husband. At the later stages the cause of that disregard may not be a matter which it is necessary to determine, but in so far as it is relevant I have no doubt that his feelings against his opposing solicitor accounted for a good deal. In the witness-box those feelings emerged time and again, as did his great difficulty in appreciating, or indeed remembering, matters which tended against the particular point he was pursuing. It was from this and not from conscious intention that stemmed a general unreliability of testimony and also a certain amount of the above disregard.

In those circumstances it seems to me that the husband ought to be indemnified, in that he should be protected against the consequences of proceedings being continued after the beginning of August, 1957. On principle I would have thought that the wife's solicitors should be ordered to pay the costs from then on a solicitor and client basis, but no authority has been cited for making an order other than for party and party costs.

On the figures in the registrar's report that entails a payment by the solicitors as regards party and party costs of £105 in addition to the £45 previously mentioned: the £105 relates solely to costs up to and including those of October 21, 1957. (That still leaves the husband to bear his own costs to the extent of £108.) If the solicitors to the wife wish, despite the above figures being available, to have a further and formal taxation as to the £105, I am inclined to think they are entitled to insist on it subject to questions of the incidence of the further costs.

There is also the question whether I should give any further guidance to the registrar on his taxation of the wife's solicitor's bill as submitted under Schedule III of the Legal Aid and Advice Act, 1949. This includes just over £200 profit costs up to October 21, 1957 (subject to the 15 per cent. reduction made under the Schedule). In this connexion I have had in mind authorities such as *In re Dartnall*, *Sawyer v. Goddard*,¹⁴ but having regard to the area committee's decision, it seems to me I should not give further guidance or indicate that the solicitors should bear any costs of proceedings prior to October 21, 1957, other than

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¹⁴ [1895] 1 Ch. 474.

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those which I have dealt with earlier in relation to the excessive documents.

[His Lordship then heard argument as to costs incurred since October 21, 1957, and said:] Exercising my discretion in accordance with the recognized principles I order the solicitors to pay all those costs. As to the legal aid taxation, my guidance to the registrar is that as from the period after October 21, 1957, and up to the notice of change of solicitors there should be no costs allowable in respect of the issues which have been dealt with today. As regards the transcript, I think one half of that should be paid by the solicitors. All costs which I have ordered the wife's solicitors to pay to the husband are on a party and party basis and the orders are made against the firm and not against any particular individual.

Solicitors: *Donald A. Kershaw & Co.; Patersons, Snow & Co.; Walter, Burgis & Co.*

J. B. G.

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March 5, 14.

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C. A.

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May 16, 19;

July 14.

Hodson,
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PRESCOTT (FORMERLY FELLOWES) v. FELLOWES.

Husband and Wife—Settlement—Variation—Ante-nuptial settlement—Securities transferred to husband as “absolute gift”—Deed also providing for loan to husband if he became member of Lloyd's by fixed date—Provision as to loan never becoming effective—Marriage dissolved on wife's petition — Whether transferred securities or sum representing their value capable of being “property settled” over which court has jurisdiction—No element of periodical payment remaining at date of decree absolute—Matrimonial Causes Act, 1950 (14 Geo. 6, c. 25), s. 25.

On the day before their marriage in June, 1953, a husband and wife entered into a deed endorsed “Settlement on Marriage.” By clause 1 the wife agreed “in consideration of” the intended marriage to transfer to the husband “as an absolute gift unaffected “by anything hereinafter contained” securities to the value of £15,000. By subsequent clauses the wife covenanted to provide him with a loan of £20,000 if at any time before December 31, 1955, he became qualified for membership of Lloyd's, in which event interest on the loan might become payable by him. Membership of Lloyd's required the husband to show assets to the value of £35,000.

On July 20, 1953, securities to the value of £15,000 were transferred to the husband. He did not become a member of Lloyd's

either before December 31, 1955, or at all, and accordingly the provisions in the deed as to the loan were never implemented. The marriage was dissolved on the wife's petition on the ground of her husband's desertion of her, the decree nisi being made absolute on January 28, 1958.

The wife applied to the court to vary the provisions of the deed as an ante-nuptial settlement under section 25 of the Matrimonial Causes Act, 1950,¹ asking that the securities or the sum of £15,000 representing their value should be returned to her.

Stevenson J. held that the deed treated as a whole was an ante-nuptial settlement, notwithstanding the words "absolute gift" in clause 1; and he ordered an inquiry as to what investments or securities now represented the assets transferred to the husband. The husband appealed:—

Held, that the court had no jurisdiction to make any order under section 25 of the Act of 1950; though the deed as a whole might originally have been regarded as an ante-nuptial settlement falling within the wide interpretation given by the courts to that term in section 25 or its predecessors, there remained no "property settled" at the date of the decree absolute, which was the material date for the court's inquiry, for (a) the provisions relating to the loan had become wholly nugatory on January 1, 1956; and (b) the transfer of the securities was an absolute disposition of property in favour of the husband, albeit for good consideration, namely, marriage, and could not be treated as a "settlement" for the purposes of section 25, and was not "property settled" with reference to which the court could make any order.

Per Hodson L.J. Not every payment made and every present given by one spouse to another constitutes settled property. But if there is a gift by one spouse to another or a payment made in consideration of marriage and periodical payments in relation thereto still remain to be made at the time when the court has to inquire into the existence of a settlement, then there remains "property settled" in relation to which the court may make an order under section 25.

Dormer (orse. *Ward*) v. *Ward* [1901] P. 20; 17 T.L.R. 12 and *Hubbard* (orse. *Rogers*) v. *Hubbard* [1901] P. 157 applied.

Parrington v. *Parrington* [1951] W.N. 534; [1951] 2 T.L.R. 918; [1951] 2 All E.R. 916 and *Hindley* v. *Hindley* [1957] 1 W.L.R. 898; [1957] 2 All E.R. 653 approved.

Bosworthick v. *Bosworthick* [1927] P. 64; 42 T.L.R. 719 distinguished.

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¹ Matrimonial Causes Act, 1950, s. 25: "The court may after pronouncing a decree for divorce or for nullity of marriage inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the

"application of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the marriage, as the court thinks fit, and the court may exercise the powers conferred by this section notwithstanding that there are no children of the marriage."

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Smith v. Smith [1945] W.N. 104; 61 T.L.R. 331; [1945] 1 All E.R. 584; *Halpern v. Halpern* [1951] P. 204; [1951] 1 T.L.R. 461; [1951] 1 All E.R. 315 and *Brown v. Brown* [1937] P. 7; 53 T.L.R. 9; [1936] 2 All E.R. 1616 questioned.

Decision of Stevenson J. (*infra*); [1958] 1 All E.R. 824 reversed.

APPLICATION.

A wife applied to vary the provisions of a deed dated June 19, 1953, entered into on the day before the marriage, on the ground that it was an ante-nuptial settlement within the meaning of section 25 of the Matrimonial Causes Act, 1950. This was denied by the respondent husband. The wife also sought to obtain an order for the transfer to her of securities representing the sum of £15,000, or alternatively for payment to her of £15,000; but that application was modified at the hearing before Stevenson J. through her counsel, and she asked for an order for an inquiry before the registrar as to what investments or securities represented the sum of £15,000 at the date of the hearing.

The marriage took place on June 20, 1953. In May, 1954 (according to the evidence given at the hearing of the wife's petition, which was undefended), the husband deserted the wife. A decree nisi was pronounced on October 25, 1957, and that decree was made absolute on January 28, 1958. There were no children of the marriage.

The husband was a squadron-leader in the Royal Air Force and from the affidavits filed on this application it appeared that he had no resources other than his service pay. The wife's means were substantially greater than those of her husband and she was said to be substantially older. The parties were described in the certificate of their marriage merely as "of full age."

As a result of discussions between the parties before the marriage took place, it was contemplated that the husband should resign from the Royal Air Force with a view to becoming an underwriting member of Lloyd's and that the wife should provide funds to enable him to do so and thereby acquire an income, the benefit of which the wife would, as a wife, presumably share. As a result of such discussions and of negotiations between the solicitors for the parties, the deed, the nature and effect of which was in issue, came into existence. It was called on its endorsement "Settlement on Marriage."

The body of the document recited that a marriage had been agreed on and would shortly take place between the parties. The

operative part read: "Now this deed witnesseth that in consideration of the said marriage it is hereby agreed as follows:—
 "1. Lady Prescott" [the then name of the wife] "will immediately after the solemnization of the said marriage transfer to Squadron-Leader Fellowes as an absolute gift unaffected by anything hereinafter contained the securities short particulars of which are set out in the schedule hereto." The schedule in question included a reference to £22 in cash, the sum which the parties believed at the date of the deed to be sufficient to bring the value of the securities specified in the schedule up to £15,000.

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In its second clause, the deed contained a covenant by Lady Prescott with Squadron-Leader Fellowes which provided, so far as material, that if at any time before December 31, 1955, Squadron-Leader Fellowes should produce written evidence from a recognized firm of Lloyd's underwriters that they were prepared to recommend him for membership of Lloyd's subject to his being able to show assets to the value of £35,000, and that all other conditions precedent to membership of Lloyd's had been fulfilled, Lady Prescott would pay to Squadron-Leader Fellowes the sum of £20,000, or transfer to him securities or other property or bonds, all being, so far as possible, of a nature acceptable to Lloyd's for membership, to a total value of £20,000. A proviso which followed limited Lady Prescott's obligation under the covenant to the value of her unencumbered cash securities and freehold and leasehold property at the time when she might be called on to comply with the covenant.

Clause 4 of the deed provided that the sum of £20,000, or any property representing the same transferred by Lady Prescott to Squadron-Leader Fellowes in pursuance of the covenant, should be for all purposes treated as a loan by Lady Prescott to Squadron-Leader Fellowes. It provided further for payment of interest at 5 per cent. per annum on the loan by Squadron-Leader Fellowes to Lady Prescott if demanded by Lady Prescott on the usual quarter days; but if Squadron-Leader Fellowes did not become a member of Lloyd's by March 31, 1956, or at any time ceased to be a member of Lloyd's, the loan was to be immediately repayable.

There were further provisions for securing the loan by an endowment policy of assurance on the life of Squadron-Leader Fellowes, and there were various other events provided for in the deed which were not material to the present application.

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On July 20, 1953, securities to the value of £15,000 were transferred to Squadron-Leader Fellowes in pursuance of the promise in clause 1 of the deed. In the events which happened the husband did not become a member of Lloyd's before December 31, 1955, or at all.

The matter came before Stevenson J. on the report of Mr. Registrar Kinsey dated February 13, 1958. The registrar's submissions, made "with great reluctance," were: "(1) If the deed . . . is not a settlement, the wife's application must be dismissed. (2) If the deed is an ante-nuptial settlement, it cannot now be varied as asked because the fund is not in possession, and there is no power to order the husband to pay to the wife the value of the securities, and if this is right, the application must be dismissed."

G. H. Crispin for the wife.

P. R. Hollins for the husband.

The following cases, in addition to those cited in the judgment, were referred to in argument: *Joss v. Joss*²; *Bosworthick v. Bosworthick*³; *Walpole v. Walpole and Goddard*⁴; *Attwood v. Attwood*⁵; *Hodgson Roberts v. Hodgson Roberts*⁶; *Hindley v. Hindley*.⁷

Cur. adv. vult.

STEVENSON J. stated the facts substantially as set out above and continued: The husband did not become a member of Lloyd's, and the terms of the deed relating to the provision of £20,000 by the wife did not come into effect and have to be considered in this case only so far as they throw any light on the question whether the document was an ante-nuptial settlement. The practical purpose of this application from the wife's point of view is, therefore, to recover £15,000 or the investment or investments representing that sum.

The registrar came to the conclusion that the deed in question was an ante-nuptial settlement. He says: "This deed has none of the features of an ante-nuptial settlement. There are no trustees and no provision is made for the payment of the income

² [1943] P. 18; 59 T.L.R. 64;
[1943] 1 All E.R. 102.

³ [1927] P. 64; 62 T.L.R. 719.

⁴ [1901] P. 196.

⁵ [1903] P. 7.

⁶ [1906] P. 142; 22 T.L.R. 395.

⁷ [1957] 1 W.L.R. 898; [1957] 2 All E.R. 653.

“from the fund to either spouse, or on the death of one spouse,
 “or as to the fund itself, on the death of either or both spouses,
 “as to children of the marriage. Clause 1 of the deed appears
 “to constitute an absolute gift of securities (amounting to about
 “£15,000) to the husband immediately after the solemnization of
 “the marriage. The rest of the deed is inoperative.”

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After referring to certain authorities dealing with post-nuptial settlements¹ the registrar says: “Applying the tests laid down by
 “the authorities, it seems to me that the settlement in this case
 “provides for the financial benefit of the husband and probably
 “of the wife after the marriage.” The registrar goes on to say
 that the provisions of clauses 1 and 2 of the deed, together with
 the affidavit evidence, make it abundantly clear that the motive
 of the settlement was to set up the husband as a member of
 Lloyd’s, thus providing him with an income from which the wife
 would also derive some benefit. The husband could not approach
 Lloyd’s on the basis that he had a rich wife. “The money and
 “securities had to be in his name.” For these reasons the
 registrar comes to the conclusion and submits that the deed dated
 June 19, 1953, is an ante-nuptial settlement within the meaning
 of section 25 of the Matrimonial Causes Act, 1950.

Counsel for the husband has contended before me that the
 transfer of £15,000, or securities representing the same, was an
 absolute gift made before marriage, which cannot properly be
 regarded as an ante-nuptial settlement for the purpose of
 section 25.

It has been pointed out that the following words of the deed
 disclose a patent ambiguity: “Now this deed witnesseth that in
 “consideration of the said marriage it is hereby agreed as follows:
 “1. Lady Prescott will immediately after the solemnization of
 “the marriage transfer to Squadron-Leader Fellowes as an
 “absolute gift unaffected by anything hereinafter contained the
 “securities short particulars of which are set out in the schedule
 “hereto.” It is said that if the phrase “an absolute gift” is
 given its full meaning, it cannot be reconciled with the phrase
 “in consideration of the said marriage.”

It was suggested in argument that the words in the deed
 “as an absolute gift” may have been inserted by the solicitor
 acting for the wife because he had in mind some advantage
 connected with stamp duty in using them. I have no means of

¹ The registrar referred to *Halpern v. Halpern*, *Parrington v. Parrington*
 and *Prinsep v. Prinsep*, post.

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determining this, and I have not taken it into account in forming my view as to the proper construction of this deed.

Looking at the deed as a whole, and having regard to the position of the parties when they entered into it as it appears from the language of the document and the affidavits before me, I have no doubt that it was a provision made by Lady Prescott in favour of the man whom she was intending to marry and made in his favour in the character of an intended husband. I have no doubt that it was in fact made in consideration of the marriage which was to take place on the day following the execution of the deed.

To the extent to which the words "as an absolute gift "unaffected by anything hereinafter contained" exclude the concept of a transfer of property to the intended husband for a consideration passing from him to the intended wife, I think the words must be treated as having less than the full meaning they would bear if their ordinary connotation were given to them.

The cases of *Prinsep v. Prinsep*,² *Halpern v. Halpern*,³ *Parrington v. Parrington*⁴ and *Smith v. Smith*⁵ have all been cited and carefully considered before me. They are all cases dealing with the question whether particular dispositions made after marriage were post-nuptial settlements falling within section 25 of the Matrimonial Causes Act, 1950. No case has been cited to me dealing with an ante-nuptial settlement.

I apprehend that where a financial provision is made between intending spouses before and expressed to be in consideration of marriage, the question whether it is an ante-nuptial settlement under section 25 of the Matrimonial Causes Act, 1950, is unlikely to be seriously contested, and I think that the relevance of the various authorities dealing with post-nuptial settlements in the present case is that they demonstrate that the word "settlement" in the section must be liberally construed and, also, the transfer of property to trustees who are to hold it for the benefit of the spouses or either of them is not an essential feature of a post-nuptial settlement. In my opinion it is not an essential feature of an ante-nuptial settlement for the purpose of section 25.

² [1929] P. 225; 45 T.L.R. 376.

³ [1951] P. 204; [1951] 1 T.L.R. 534; [1951] 1 All E.R. 315.

⁴ [1951] W.N. 534; [1951] 2 T.L.R. 918; [1951] 2 All E.R. 916.

⁵ [1945] W.N. 104; 61 T.L.R. 331; [1945] 1 All E.R. 584; and see [1951] P. 204, 209.

The provisions of clause 4 of the deed of June 19, 1953, did contemplate, in the events there set out, the making of periodical payments by the husband to the wife, and this, I think, gives further support to the view that this is an ante-nuptial settlement.

In the result I hold that the deed of June 19, 1953, is an ante-nuptial settlement within the meaning of section 25 and is correctly described in its endorsement as "Settlement on "Marriage." It is not, in my opinion, possible to sever clause 1 from the remainder of the deed as I was invited to do.

I ought, perhaps, to mention that the evidence before me includes a letter from the wife's then solicitor to the husband's solicitor dated December 31, 1957, and correspondence between the wife's present solicitors and the Controller of Stamps from which it appears that the instrument of June 19, 1953, is not considered by the Controller of Stamps to fall within the "charge" of duty under "settlements" in the first schedule of the Stamp Act of 1891, because it does not contain trusts limiting the "use of the securities for any person in succession."

I mention this correspondence only to make clear that in my view the Stamp Act, 1891, and the views of the Controller of Stamps as to the stamp duty attracted by the deed in question have no bearing on the question I have to decide and I have excluded such matters from my mind.

Dealing with the second part of the application, the registrar says in his report: "The husband in this case has realized the "securities and used the money and this does not seem to be "disputed. The securities therefore could not be transferred to "the wife as they do not exist, and there is no power under "section 25 to order the husband to make a cash payment even "if the money were in his possession." He therefore submits that the application should be dismissed.

By an affidavit sworn by the husband on December 18, 1957, the husband says: "In any event the money realized from the "securities transferred to me has been used by me for the purpose of business other than Lloyd's. I treated the money as "my own and I say I have every right to do so as the securities "were transferred to me as an absolute gift." The husband does not specify the business "other than Lloyd's" for which he has used the money realized from the securities, and there is no evidence before me to indicate what is the present form of investment, if any, of these moneys; but the husband's affidavit is in

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my opinion consistent with this money being in the form of investments or an investment still under the husband's control.

In *Smith v. Smith*⁶ Denning J., after dealing with the authorities to which I have already referred relating to post-nuptial settlements, said: "A wife is often free to assign her interest under an ordinary marriage settlement or a separation deed, but it is none the less a 'settlement.' If she should assign her interest, the court might treat the proceeds in her hands as representing the property; and a co-respondent, or indeed any person, who takes an assignment from her with notice that proceedings are pending as to the application of the property, will find that the arm of the court is long enough to reach the property in his hands."

In these circumstances, I direct an inquiry before the registrar as to what investments or securities now represent the assets transferred to the husband under clause 1 of the deed of June 19, 1953, and I direct that this application be restored to the list when this inquiry has been concluded.

Order accordingly.

J. B. G.

The husband, maintaining that the original securities, which he had treated as an absolute gift, had long since been sold and the proceeds mixed with his own moneys, appealed.

Gerald Gardiner Q.C., P. R. Hollins and A. B. Ewbank for the husband. Three questions arise: first, whether the gift of securities to the value of £15,000 was a pre-nuptial settlement within section 25 of the Act of 1950¹; secondly, if it was, whether, when the securities have been sold and the proceeds used, the court can "vary" the "settlement" by ordering the husband to pay the wife £15,000 in money; and thirdly, if it can, whether on the merits such an order should be made?

In approaching these questions the court should bear in mind (a) that the mere form is immaterial, for the court must look at all the surrounding circumstances to determine the true nature of the transaction; (b) that the matter has to be judged as at the date when the court makes its inquiry, and that date is the date of the decree absolute: *Dormer (orse. Ward) v. Ward*²; and (c) that it is possible to reconcile the various decisions as to what

⁶ [1945] 1 All E.R. 584, 586; and
 see [1951] P. 204, 211.

¹ See note 1, ante, p. 261.

² [1901] P. 20, 37; 17 T.L.R. 12.

is or is not a pre- or post-nuptial settlement within section 25 or its predecessors (which were in similar terms) if a distinction is drawn (i) between cases in which the court was deciding whether or not an admitted settlement was nuptial and those in which the question was whether a transaction was a "settlement" at all; and (ii) between the ratio decidendi and observations obiter.

On the first question, this document, in form a "Settlement "on Marriage," consists of (a) an absolute gift expressly providing that it was not affected by anything hereinafter contained, and (b) a provision for a loan which at the date of the decree absolute was dead. Accordingly, there is no "settlement" and no "property settled" at the relevant date over which the court can exercise its jurisdiction under section 25. Though a wide interpretation has been given to "settlement" in this section and its predecessors, the courts have never gone so far as to hold that an out-and-out gift could be a marriage settlement. *Hubbard* (orse. *Rogers*) v. *Hubbard*³ is authority binding on this court that such a gift is not within the section. Nor has the court ever held that an agreement to lend a sum of money could be a settlement within the section. *Chalmers* v. *Chalmers*⁴ is also relied on.

Bosworthick v. *Bosworthick*⁵ is distinguishable. The Court of Appeal there held that a bond to secure periodical payments on an annuity, which payments were still outstanding at the date of the court's inquiry, amounted to a post-nuptial settlement within the section. The test as between gifts in favour of spouses which have been held to be "settlements" within the section and those which are not is the test of periodical payments still outstanding. In *Prinsep* v. *Prinsep*,⁶ where there was an admitted settlement, the court had to consider whether it had the necessary "nuptial" element. The same question was considered in *Melvill* v. *Melvill* and *Woodward*⁷; Bateson J. at first instance held that it was not a post-nuptial settlement on the wife "in her character as a wife" but a settlement on herself and her children. The Court of Appeal decision reversing Bateson J. was in fact a decision on the merits, for the wife, while being divorced herself, was trying to prevent the court from getting at her funds: see dicta *per* Lord Hanworth M.R.⁸ on the undesirability of narrowing the scope of the section, and *per*

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³ [1901] P. 157.⁴ (1892) 68 L.T. 28.⁵ [1927] P. 64; 42 T.L.R. 719.⁶ [1929] P. 225; 45 T.L.R. 376.⁷ [1930] P. 159, 162; 46 T.L.R. 327.⁸ [1930] P. 159, 171.

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Romer L.J.⁹ that the motive of the settlor was immaterial to the question for decision. That is relevant here, where it is said that the wife's motive was to provide the husband with funds for membership of Lloyd's and that therefore the document must be considered as a whole.

*Brown v. Brown*¹⁰ is not inconsistent with *Bosworthick v. Bosworthick*,¹¹ for the court there held that where a wife purchased an annuity from an insurance company it was not a settlement but an absolute gift.

[ROMER L.J. I cannot understand why the gift of an annuity was a "settlement" in *Bosworthick's* case,¹¹ whereas a capitalization of the amount in *Brown's* case¹² was not. The annuity could have been sold by the spouse on the day following.]

But if the spouse does not sell it, and under the document payments remain to be made at the date of the decree absolute, there may be a settlement within the section. In *Hindley v. Hindley*¹³ Davies J. held that the matter before him was not a settlement because there was no element of periodicity. [*Joss v. Joss*¹⁴ was also referred to.]

On the second question, it is conceded that there are dicta by Denning J. in *Smith v. Smith*¹⁵ which suggest that the court can treat the proceeds of an assigned interest in the hands of a spouse as settled property and can follow money; those dicta have created difficulties in later cases, but they have no application here, where the husband sold the transferred securities at once and used the proceeds. The ratio of *Smith's* case¹⁵ is not wrong; but the dicta, which went wider than any decision, were obiter only and are difficult to reconcile with *Hubbard v. Hubbard*.¹⁶

[HODSON L.J. Denning J. tried to distinguish *Hubbard's* case¹⁶ and held that the house jointly owned in *Smith v. Smith*¹⁷ was "a continuing provision" for the future needs of the spouses and therefore there was a post-nuptial settlement on which the court could make an order.]

[ROMER L.J. If the loan had been made here, it could be said that it was a "continuing provision" for the future needs of this husband "in his character as a husband." Nothing is

⁹ [1930] P. 159, 179.

¹⁰ [1937] P. 7; 53 T.L.R. 9; [1936] 2 All E.R. 1616.

¹¹ [1927] P. 64.

¹² [1937] P. 7.

¹³ [1957] 1 W.L.R. 898; [1957] 2 All E.R. 653.

¹⁴ [1943] P. 18; 59 T.L.R. 64; [1943] 1 All E.R. 102.

¹⁵ [1945] W.N. 104; 61 T.L.R. 331, 332; [1945] 1 All E.R. 584.

¹⁶ [1901] P. 157.

¹⁷ 61 T.L.R. 331, 332.

surprising in these cases where one gets so far from the ordinary conception of a "settlement."]

There must be some limit, and *Hubbard v. Hubbard*¹⁸ decided that an absolute gift exceeded the limit. The decision of Wallington J. in *Gunner v. Gunner and Stirling*¹⁹ that an out-and-out benefit under an insurance policy was a settlement is distinguishable on its facts. *Parrington v. Parrington*²⁰ shows how the court should look at the substance and not the form of the transaction. [*Halpern v. Halpern*²¹ was also referred to.]

Thirdly, on the merits, what the wife here asks for is a judgment of debt, namely, that her former husband owes her £15,000, which he has not got; it follows that if he does not pay he will be made bankrupt. The order made by Stevenson J. was made on the footing that the court had jurisdiction to follow the money. The only authority supporting that are the dicta obiter of Denning J. in *Smith v. Smith*.²² The court has never held that what might at some time have been "property settled" within the section but has since been disposed of must be returned. This husband gave up his career; the wife had him as a husband for a year; he has gained nothing and has lost the prospects in his Services career which he had before his marriage. On the true construction of section 25 this was not a pre-nuptial settlement, and the court has no jurisdiction to make any order under the section.

Roger Ormrod Q.C., G. H. Crispin and T. Coningsby for the wife. First, on the narrow basis that the court has jurisdiction, the document here is clearly an ante-nuptial settlement. It may be tested by considering the position if this husband had committed adultery instead of deserting his wife in 1954; at that date he could have enforced the loan provisions of the deed; and if the wife had divorced him for adultery and the court had made its inquiry at any date in 1954, there would undoubtedly have been a "settlement" to vary. Can the position be different merely because the law required her to wait three years before she could divorce him on the ground of desertion, with the result that the inquiry was only held after the liability for the loan had come to an end on December 31, 1955? That test supports the submission that the court has jurisdiction in relation to this deed of settlement.

¹⁸ [1901] P. 157.

¹⁹ [1949] P. 77; 64 T.L.R. 513;
[1948] 2 All E.R. 771.

²⁰ [1951] W.N. 534; [1951] 2
T.L.R. 918; [1951] 2 All E.R. 916.

²¹ [1951] P. 204; [1951] 1 T.L.R.
461; [1951] 1 All E.R. 315.

²² 61 T.L.R. 331, 332.

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If that submission is not acceptable, then it is submitted on a wider basis that the deed must be looked at as a whole, and clause 1 cannot be severed from the later provisions as to the loan.

[HODSON L.J. The answer to that is that the deed carefully separates the gift of £15,000 and the loan provisions.]

But the joint plan of these parties was that the wife should provide £35,000 for the specific purpose of enabling her husband to become a member of Lloyd's. The £15,000 to be paid immediately after the marriage is an integral part of the £35,000. Had he become a member of Lloyd's his wife would have benefited from his earnings as an underwriter, and there would on any view have been a settlement.

[HODSON L.J. But that cannot assist, for in *Melville v. Melville and Woodward*²³ Romer L.J. said that the motive was immaterial. If the court finds a periodical payment, there is "property settled" on which it can bite; but if there is no property settled, we cannot deal with it: see *Dormer v. Ward*.²⁴ Though we may have to look at the piece of paper, the question which still remains is: what is the "property settled"??]

It has been held from the earliest times that a covenant to make payments in a deed of separation is "property settled" within the section: see *Worsley v. Worsley and Wignall*.²⁵ It cannot be right that a document which is a series of transactions constituting a settlement can be a settlement at one moment and cease to be such at a later moment. The general doctrine that the court's inquiry must be at the date of the decree rests only on *Dormer v. Ward*,²⁶ which was a decision on its special facts, for the marriage there was a nullity.

[HODSON L.J. That does not alter the position. The statute at that date said that the court must inquire "after a final "decree of nullity of marriage," so the court had to reinstate the marriage in order to operate the section.]

It is not possible to submit in this court that the judgment in *Hubbard v. Hubbard*²⁷ so far as it affects the present case is largely obiter.

[HODSON L.J. *Hubbard's* case²⁷ is binding in so far as it decided that the assignment there was a gift and not a settlement within the section.]

²³ [1930] P. 159, 179.

²⁶ [1901] P. 20.

²⁴ [1901] P. 20.

²⁷ [1901] P. 157.

²⁵ (1869) L.R. 1 P. & M. 648.

If this husband has £15,000 in some form of securities, it is "property settled" with which the court can deal. The court is not confined to the document; but this deed was a marriage settlement; at the time when the court's inquiry was made there was "property settled" in existence, and Denning J. in *Smith v. Smith*²⁸ said that a lump sum might be regarded as "continuing provision" which the court could follow. It is conceded that it is difficult to ask the court to follow the dictum of Denning J. with *Hubbard's* case²⁹ in the way; and it is also conceded that if the husband has dissipated the funds that is an end of the matter. The wife is no longer asking that he shall pay her £15,000 in money, and if the court cannot regard that sum as part and parcel of the £35,000, and therefore "property settled," that concludes the matter in this court.

Gardiner Q.C. in reply. If the attempt to follow the property into the husband's hands is abandoned, the whole issue in this case becomes academic.

Cur. adv. vult.

HODSON L.J. This is an appeal from an order of Stevenson J. made on an application to vary the provisions of a deed, dated June 19, 1953, as an ante-nuptial settlement. The judge held that a gift made by the petitioner wife to the respondent husband in pursuance of the provisions of the deed was property settled by her on him within the meaning of section 25 of the Matrimonial Causes Act, 1950.

The marriage took place on June 20, 1953, and the deed is endorsed "Settlement on Marriage." The marriage was dissolved by decree absolute on January 28, 1958; and the wife has invoked the jurisdiction of the court conferred by section 25. This section is the successor of earlier sections, the first of which is section 5 of the Matrimonial Causes Act, 1859; but the alterations which have been made in the language of the section dealing with variation of settlements by the legislature from time to time do not affect the question under consideration in this case, which is whether there is here any jurisdiction to make an order. [His Lordship read the section and continued:]

The material date for the purposes of the inquiry is the date of the decree absolute of divorce. This has been established by the decision of the Court of Appeal when it was unsuccessfully argued that a settlement had come to an end at the moment of the divorce in the one case and after the divorce in the other: see

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²⁸ 61 T.L.R. 331, 332.

²⁹ [1901] P. 157.

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On July 20, 1953, securities to the value of £15,000 were transferred to the husband in pursuance of the promise contained in clause 1 of the deed. The husband never became a member of Lloyd's before December 31, 1955, or at all, and the subsequent provisions of the deed therefore ceased to have effect. The position at the date of the divorce was, therefore, that, whether or no the deed in question taken as a whole might be treated as an ante-nuptial settlement, the only property which could then be dealt with by the court as property settled was the £15,000 or the securities representing the same.

It is to be observed that the transfer of securities was expressed to be an absolute gift to the husband unaffected by anything thereafter contained in the deed. It is not strictly accurate to describe the transaction as an absolute gift since it was made for good consideration, namely, marriage; but there was no settlement in the ordinary sense of the word as used by conveyancers. Nevertheless it was argued for the wife that the section has been given a wide interpretation by the courts, who have long since departed from the view that the conveyancer's conception of a settlement is of any assistance in deciding the question. Accepting this contention as correct, some effect must nevertheless be given to the word "settled" in the Act of Parliament, and the courts have, as the authorities show, recognized that it is not to be given the same meaning as if all dispositions made by one spouse in favour of the other or by a third party in favour of a spouse had been expressly included in the section.

To show the wide interpretation given from earliest times to the language of the section it is useful to refer to *Worsley v. Worsley and Wignall*.³ Here an ordinary deed of separation was treated as a post-nuptial settlement and varied accordingly. The language of Lord Penzance has had, I think, influence on subsequent decisions, and I quote a passage from his judgment⁴: "The court would have a great difficulty in saying that any deed "which is a settlement of property, made after marriage, and "on the parties to the marriage, is not a post-nuptial settlement. "It would not be justified in narrowing the reasonable scope of "the words used in the section. The substance of the matter is,

¹ [1901] P. 20; 17 T.L.R. 12.

³ (1869) L.R. 1 P. & M. 648.

² [1943] P. 7; 59 T.L.R. 13;

⁴ Ibid. 651.

[1942] 2 All E.R. 471.

“ that the legislature by this section has armed the court with
 “ authority to make special arrangements in the case of a woman
 “ being found guilty of adultery, in reference to property settled
 “ upon her in her character as a wife. The substantial feature to
 “ bring the case within the clause of the statute is, that a sum
 “ of money is paid to a woman in her character as wife, or is
 “ settled upon her in that character and whilst she continues a
 “ wife.”

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The payments made to a spouse in his or her character as a spouse give to those payments the qualification of nuptial, but it does not follow that every payment made and every present given by one spouse to the other constitutes settled property. Were it so, highly inconvenient results would follow which in some cases might seem to be absurd if, for example, a spouse claimed the return of some trifling article of furniture given for the purpose of increasing the comfort or elegance of the matrimonial home. Wedding presents given by third parties would not necessarily be settled property although given to the spouse in her character as a spouse unless they had some characteristic which entitled them to be treated as settled property. Gifts, therefore, have been recognized by the courts as outside the scope of the section, with a qualification which will appear: see *Chalmers v. Chalmers*,⁵ cited to and approved by the Court of Appeal in *Hubbard (orse. Rogers) v. Hubbard*.⁶ In the former case an assignment of property by a wife to a husband while they were living together was held on a divorce not to be a settlement. In the latter case a husband executed a deed by which he assigned to a trustee a leasehold house and some furniture upon trust to assign the same at once to the wife absolutely and the trustee assigned the same accordingly. The judgment of Rigby L.J., agreed to by Vaughan Williams L.J. and Stirling J., was as follows: “ In my opinion the decision of the learned President ” [Sir Francis Jeune P.] “ that this deed is a settlement within “ the meaning of section 5 of the Matrimonial Causes Act, 1859, “ cannot be supported, for the plain reason that the deed is not “ a settlement at all. If we were inquiring whether the deed “ ought to be set aside under section 47 of the Bankruptcy Act, “ 1883, different considerations would arise—considerations which “ are wholly irrelevant on the present occasion. I am inclined to “ say that the decision of the learned President himself in “ *Chalmers v. Chalmers* ⁸ is directly in point, and is to be

⁵ (1892) 68 L.T. 28.⁷ Ibid.⁶ [1901] P. 157.⁸ 68 L.T. 28.

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“ preferred to his decision in the present case. I do not, however,
“ rest my decision upon *Chalmers v. Chalmers* ⁸ as an authority;
“ I base it upon the general ground that this deed is not a
“ ‘ settlement ’ in any sense, and cannot therefore be a settlement
“ within section 5.”

This decision is binding on this court, and, unless it can be
validly distinguished, is in my opinion conclusive in favour of the
husband.

Some difficult questions have no doubt arisen where, even
though there is an absolute gift, yet the courts, again giving a
wide interpretation to the section, have found a settlement to
be in existence at the material date. Such a case was envisaged
by Sir Francis Jeune P. during the argument in *Chalmers v.*
Chalmers, when he said ⁹: “ Supposing the wife made him a
“ present of an annuity that would not be a settlement.”

This question fell for decision in *Bosworthick v. Boswor-*
thick.¹⁰ There a bond had been executed by a wife securing to
her husband an immediate annuity of £300 for his life. Upon
the dissolution of the marriage the wife applied for an order
extinguishing her liability under the bond. It was unsuccessfully
argued on behalf of the husband that the giving of this bond was
not a settlement by the wife on the husband, and, accordingly,
the court gave the answer to the question earlier posed by
Sir Francis Jeune P. different from the one which in the
Chalmers case ¹¹ he had been inclined to give.

In reaching its decision the court expressly based itself on an
earlier decision of the Court of Appeal in *Dormer* (orse. *Ward*) v.
Ward,¹² where the Court of Appeal held that a covenant to pay a
yearly sum constituted settled property, the disposition of which
could be varied under the Act empowering the courts to vary
settlements. The court there rejected the argument that the
covenant contained in the settlement under consideration merely
constituted a debt and was not property settled on the petitioner.

In *Bosworthick's* case ¹³ the Court of Appeal treated the bond
as on the same footing as the covenant in *Dormer* (orse. *Ward*) v.
Ward.¹⁴ Lord Hanworth M.R. said ¹⁵: “ Following upon a
“ number of other decisions, there is *Dormer* (orse. *Ward*) v.
“ *Ward* ¹⁶ in this court, which was an application to vary a

⁸ 68 L.T. 28.

⁹ Ibid. 29.

¹⁰ [1927] P. 64; 42 T.L.R. 719.

¹¹ 68 L.T. 28.

¹² [1901] P. 20.

¹³ [1927] P. 64.

¹⁴ [1901] P. 20.

¹⁵ [1927] P. 64, 69-71.

¹⁶ [1901] P. 20.

“settlement comprising a covenant by the husband to pay a
 “yearly sum of £200 to the wife during their joint lives. Mr.
 “Hewitt says that the door was open in that case to vary the
 “covenant, because there was also settled property included in
 “the settlement. With regard to the covenant to pay the
 “annuity, it was contended that there was no settlement except
 “by the owner of a limited estate subject to powers; that there
 “was a great distinction for that purpose between property and
 “power; and that the covenant for payment of the £200 per
 “annum merely created a debt, and was not property settled
 “upon the wife who was the petitioner. In dealing with that
 “contention—and it is quite plain from the report that the court
 “dealt seriatim with the liabilities under the settlement—
 “Vaughan Williams L.J. said ¹⁷: ‘It seems to me that the right,
 “‘and the only right, of the petitioner in respect of this covenant
 “‘is to apply to the court under section 5 to make an order for
 “‘the application of this £200 for her benefit. This, of course,
 “‘is pro tanto to vary the settlement, because, unless there was
 “‘a valid marriage, she, in my judgment, is not entitled to the
 “‘benefit of the covenant. She could not recover on the cove-
 “‘nant unless varied, but I think, for reasons which I have
 “‘already given, that the court in case of a decree of nullity
 “‘can and ought to vary the settlement, treating for the purpose
 “‘of the order that which was no marriage as if it had been a
 “‘valid marriage, and make the order for application for the
 “‘benefit of a woman not a wife of this yearly sum of £200.’
 “It is quite clear, therefore, that the court dealt with that
 “covenant separately, and although the jurisdiction of the court
 “was contested, yet the court held that it had power to deal
 “with the covenant. That decision has the greater authority
 “because the case had already been before Gorell Barnes J. in
 “the court below, and he had decided that ‘property settled’
 “within the meaning of section 5 of the Act of 1859 and section 3
 “of the Act of 1878 referred only to that particular property the
 “benefit of which was, by the marriage settlement, conferred in
 “the ordinary way on the parties or their children, and he had
 “rejected jurisdiction in respect of the covenant. He appears to
 “have taken the view that the covenant merely created a debt,
 “and that he ought not to make an order dealing with it. But
 “on appeal, in spite of the argument urged in support of the
 “decision in the court below, the Court of Appeal held that it had

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¹⁷ [1901] P. 20, 34.

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“ jurisdiction to deal with the covenant apart from the settlement, and if we were to hold that there was no jurisdiction in the present case, I think that we should be running counter to the decision of this court in *Dormer v. Ward*,¹⁷ which we cannot do.” Lord Hanworth M.R. pointed out that this was a case where payments had to be made by one spouse to the other in the character of a spouse.

The matter was put very clearly by Romer J., who said¹⁸: “ We have had numerous authorities cited to us going as far back as 1861, and amongst them an authority which is binding on this court, and in my judgment those authorities establish that where a husband has made a provision for his wife, or a wife for her husband, in the nature of periodical payments, that amounts to a settlement within the meaning of the sections. That may appear to be a very liberal construction of the sections, but I think that it is no more liberal a construction than should be given to them having regard to the obvious purposes for which they were enacted by the legislature.”

This judgment of Romer J. was quoted in extenso in a later case, *Melvill v. Melvill and Woodward*,¹⁹ where a settlement executed by a wife with the object of excluding her then husband from any interest in certain property was held nevertheless to be within the ambit of the section. That case has a bearing on the present as showing that the motive in entering into the settlement is irrelevant, as Romer L.J. there pointed out.²⁰

In the present case the motive of the wife may well have been to give her husband the chance of becoming a member of Lloyd's by giving him £15,000 and lending him £20,000, the total sum required by the committee of Lloyd's. The motive being immaterial, one must look at the deed to see what was done, and here one finds only a transfer of securities as a completed transaction involving no periodical payments to be made thereafter. A qualification must therefore be made when one speaks of gifts out and out, or uses similar language, whether payments by one spouse to the other are expressed to be made in consideration of marriage or not. If there are periodical payments still to be made (as in *Bosworthick's* case²¹) at the time when the court has to inquire into the existence of the settlement, then, provided the nuptial element is present, there can be a settlement, or, to put it more accurately, there remains “ property settled.”

¹⁷ [1901] P. 20.²⁰ [1930] P. 159, 179.¹⁸ [1927] P. 64, 72.²¹ [1927] P. 64.¹⁹ [1930] P. 159, 172; 46 T.L.R. 327.

I can find no other principle in the authorities which helps to draw the dividing line between gifts by one spouse to the other or payments made in consideration of marriage on the one hand which are not settled property and which are settled property on the other hand.

This principle was followed in *Smith v. Smith*²² by Denning J., who held, in the circumstances of the case before him, that a house held by husband and wife as joint tenants was continuing provision for the future needs of the wife in her character as wife. He did, however, appear, in applying the principle, to give there a wider application thereof than the authorities warrant, and indeed himself recognized the difficulty which the authority of the Court of Appeal had put in his way, as the following passage shows²³: "I find it difficult to reconcile the decisions in *Hubbard* (orse. *Rogers*) v. *Hubbard*²⁴ and *Brown v. Brown*²⁵ with the principle that runs through the rest of the cases on this subject. That principle, as I understand it, is that where a husband makes a continuing provision for the future needs of his wife in her character as a wife, which is still continuing when the marriage is dissolved, the provision is a 'settlement' which can be brought before the court to see whether the provision should continue now that she has ceased to be a wife. The same applies to a provision by a wife for her husband or by each or either for both. The provision usually takes the form of periodical payments either with the intervention of trustees as in an ordinary marriage settlement, or without them as in a separation deed or a bond; but it may take other forms. The transfer of an investment into a wife's name, whether it be a house, or shares, or an annuity, seems to me to be in its nature just as much a continuing provision for her future needs as is a periodical payment. The fact that it is made for no consideration other than natural affection and is in that sense a gift does not mean that it is not a 'settlement'." He then went on to refer to the *Bosworthick* case.²⁶

I respectfully agree with him in finding *Brown v. Brown*,²⁷ which was decided in the opposite way, difficult to reconcile with the principle which I extract from what was said by the Court of Appeal in *Bosworthick v. Bosworthick*,²⁸ for there was in *Brown's*

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²² [1945] W.N. 104; 61 T.L.R. 331; [1945] 2 All E.R. 584.

²³ 61 T.L.R. 331, 332.

²⁴ [1901] P. 157.

²⁵ [1937] P. 7; 53 T.L.R. 9; [1936] 2 All E.R. 1616.

²⁶ [1927] P. 64.

²⁷ [1937] P. 7.

²⁸ [1927] P. 64.

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case ²⁹ a continuing provision by way of periodical payments existing at the time of decree in the form of an annuity secured by deed in favour of the husband, the annuity having been purchased by the petitioning wife for that purpose.

Denning J.'s wide application of the principle in *Smith v. Smith* ³⁰ was followed by Collingwood J. in *Halpern v. Halpern* ³¹; but I confess that in my opinion it appears that both those cases went beyond the latitude which the authorities have conferred in the liberal interpretation of the words "property settled" in the section.

The principle which I have endeavoured to state was expressly followed by Pearce J. in *Parrington v. Parrington*, ³² when he said: ". . . in the case before me the wife will for some years "to come have to make payments under the bond."

Similarly in the present case if the loan transaction in connexion with the £20,000 had been carried into effect it would be difficult to say that there was no "property settled" while any of the interest payments were outstanding.

The same principle was applied by Davies J., who, in *Hindley v. Hindley*, ³³ held provisionally on an interlocutory application that two sums of money paid to a wife by a husband, one before and one after marriage, were not "property settled." He arrived at this conclusion, saying ³⁴: "There is, as I can see it, no "element of periodicity either with regard to the £45,000 (which "strikes me, I confess, as something more in the nature of a "present to a mistress than anything else) nor in the case of the "£68,000. And when one asks in regard to each transaction "whether anything remains to be done, or whether it is over and "done with, the answer, as I think, is that it is over and done "with."

In conclusion, I should state that although by her original application the wife claimed that the husband should, whatever had happened to the gift of securities, in any event pay the sum of £15,000 representing the value of those securities, this application was not persisted in before the registrar who conducted the inquiry in this case, nor is it proceeded with now. It would seem that the result of this case is of mere academic interest if the appellant is right in maintaining that the original securities

²⁹ [1937] P. 7.

³⁰ 61 T.L.R. 331.

³¹ [1951] P. 204; [1951] 1 T.L.R. 461; [1951] 1 All E.R. 315.

³² [1951] 2 T.L.R. 918, 922; [1951] 2 All E.R. 916.

³³ [1957] 1 W.L.R. 898; [1957] 2 All E.R. 653.

³⁴ [1957] 1 W.L.R. 898, 906.

have long since been sold and the proceeds mixed with his other moneys. I would allow the appeal.

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ROMER L.J. By the deed which is in question on this appeal, and which the wife and the husband executed upon and in consideration of their marriage, two objects were effected. It may be that in the minds of the parties these purposes were to some extent interconnected. On the face of the deed itself, however, each object had an independent legal existence. The first object was to assign to the husband for his own absolute use and benefit certain securities of the value of some £15,000 which belonged to the wife. The second purpose of the deed was to impose on the wife a contingent obligation to grant to the husband a loan of £20,000.

The agreement to transfer the securities was contained in clause 1 of the deed. The transfer was described by this clause as "an absolute gift," which it was not, because it was supported by the marriage consideration. The intention of the parties, however, in relation to the securities is quite clear, namely, that they were to pass into the absolute and unqualified ownership of the husband. The rest of the deed is taken up with the conditions on which the loan was to be granted. The object of the loan was to enable the husband to become a member of Lloyd's, if he became qualified in other respects for such membership before December 31, 1955. If the loan became payable the wife could not require repayment thereof during the husband's membership of Lloyd's and so long as the provisions of the deed were observed, save (as was later provided in the deed) through the medium of an endowment policy of assurance, which the husband was to effect on becoming a member. The loan was to bear interest at the rate of five per cent. per annum, but such interest was not to be payable unless demanded by the wife or unless the parties ceased to be treated as living together for the purposes of income tax and should become separately assessable therefor.

Inasmuch as the deed vested no property in trustees and created no successive legal or beneficial interests it had none of the attributes of a settlement which are familiar to conveyancing practitioners. It has, however, long since been established by decisions which are binding on this court that a disposition of property may constitute a "settlement" for the purposes of section 25 of the Matrimonial Causes Act, 1950, notwithstanding that it would not be regarded as a settlement of property for any

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other purpose. The liberality with which this legislation has been construed is sufficiently exemplified by *Bosworthick v. Bosworthick*.³⁵ In that case a wife executed, a few years after her marriage, a bond which secured to her husband an annuity for his life. The marriage was dissolved in 1925 and the wife applied to the court for an order extinguishing her liability under the bond. This court, affirming the decision of Lord Merrivale P., held that the bond was a post-nuptial settlement for the purposes of section 5 of the Matrimonial Causes Act, 1859, and section 192 of the Supreme Court of Judicature (Consolidation) Act, 1925; and the wife's application succeeded. In the course of his judgment Romer J., who was sitting as a member of this court, said that the authorities established³⁶ "that where a husband has made a provision for his wife, or a wife for her husband, in the nature of periodical payments, that amounts to a settlement within the meaning of the sections. That may appear to be a very liberal construction of the sections, but I think that it is no more liberal a construction than should be given to them having regard to the obvious purposes for which they were enacted by the legislature."

In view of that and other decisions it seems to me (though it is not necessary to decide the point) that the deed now in question may have constituted an ante-nuptial settlement for relevant purposes upon, and for some time subsequent to, its execution. This view is founded on the provisions of the deed which related to the loan. If the marriage had turned out successfully and if the husband had become qualified for membership of Lloyd's at any time up to December 31, 1955, the wife was liable under her covenant to provide the loan, the husband would have been liable to pay interest on it if called on to do so, and he (the husband) would have been provided with an income, some of which, presumably, would have gone towards the upkeep of the matrimonial home. It seems to me that the mutual obligations of husband and wife imposed by the deed and the payments to be effected thereunder might fairly have been regarded as "settled property" by analogy to the wife's bond to secure an annuity for the husband which was treated as settled property in *Bosworthick v. Bosworthick*.³⁶ The question, however, is immaterial, because the husband never did become a member of Lloyd's and accordingly all the provisions of the deed

³⁵ [1927] P. 64.³⁶ Ibid. 72.

which related to the loan became entirely nugatory on January 1, 1956.

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Section 25 of the Act of 1950 provides in effect that on the dissolution of a marriage the court may inquire into the existence of ante-nuptial or post-nuptial settlements made on the spouses and may make such orders as are therein mentioned with reference to the application of the whole or any part of the property settled. The questions in the present case would accordingly appear to be: (i) Was there in existence at the date of the decree absolute an ante-nuptial settlement made on the wife and the husband; and (ii) If so, was there any "property settled" upon which an order under section 25 could operate?

In my judgment both these questions quite clearly require a negative answer. In so far as the deed of June 19, 1953, might originally have been regarded as an ante-nuptial settlement for the purposes of section 25 by reason of the provisions relating to the loan, those provisions had ceased to have any effect at all nearly two years previous to the decree nisi. So far as the loan was concerned, therefore, there was no "settlement" at the date of the decree nor was there anything on which the court could lay hold as constituting settled property. It was argued before us, however (and the argument found favour with the registrar and with the judge) that the assignment of the securities by the wife to the husband rendered the deed an ante-nuptial settlement for the purposes of section 25 and that the securities themselves, or any other assets in the hands of the husband which represented the proceeds of the securities at the date of the decree, were "property settled" with reference to which an order could be made.

It would seem to me, even in the absence of authority, that an out-and-out and unqualified transfer of property by one spouse to the other cannot be regarded as a "settlement" of that property for any purpose whatever. It is indeed the very antithesis of a settlement and, widely though section 25 and its predecessors have been construed by the courts, the expressions "settlement" and "property settled" do in fact appear in the section and cannot be wholly ignored. In any case the point appears to me to have been decided by this court adversely to Lady Prescott in *Hubbard (orse. Rogers) v. Hubbard*.³⁷ In that case a husband assigned by deed to a trustee a leasehold house

³⁷ [1901] P. 157.

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and some furniture on trust to assign the same at once to the wife absolutely; which the trustee accordingly did. The marriage was subsequently dissolved and this court held that the assignment was not a "settlement" within section 5 of the Matrimonial Causes Act, 1859, and that the court therefore had no jurisdiction to vary its provisions. Rigby L.J., in delivering the judgment of the court, said that the decision of Sir Francis Jeune P. that the deed was a settlement within the meaning of section 5 could not be supported³⁸ "for the plain reason that "the deed is not a settlement at all." Then, after referring to a previous decision of the President in *Chalmers v. Chalmers*,³⁹ which Rigby L.J. said appeared to be directly in point and which was to be preferred to the decision under appeal, the Lord Justice proceeded⁴⁰: "I do not, however, rest my decision "upon *Chalmers v. Chalmers*⁴¹ as an authority; I base it "upon the general ground that this deed is not a 'settlement' "in any sense, and cannot therefore be a settlement within "section 5."

It is true that the assignment in *Hubbard* (orse. *Rogers*) v. *Hubbard*⁴² was a gift, whereas the transfer of securities by the wife to the husband in the present case was made in consideration of marriage, but I can see no difference in principle between the two cases. The decision in *Hubbard v. Hubbard*⁴² did not rest on the fact that the house and furniture there in question were a gift by husband to wife but on the out-and-out nature of the disposition; and the transfer of securities in the present case was precisely of that nature. The transfer was absolute and unrestricted, and after it had been effected the husband could not have been restrained, either at law or in equity, from disposing of the securities in any manner he thought proper. Accordingly, on the principle of *Hubbard v. Hubbard*,⁴² the deed now in question was not a "settlement" for the purposes of section 25 in relation to the transferred securities nor were the securities at any time, nor are they now, nor are any traceable assets now representing them, "settled property" with reference to which an order could be made under the section.

I am aware that there is authority which, if applied to the present case, would lead to a different result. In *Smith v. Smith*,⁴³ a husband bought a freehold house and had it conveyed

³⁸ [1901] P. 157, 160.

³⁹ 68 L.T. 28.

⁴⁰ [1901] P. 157, 161.

⁴¹ 68 L.T. 28.

⁴² [1901] P. 157.

⁴³ 61 T.L.R. 331.

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to himself and his wife as joint tenants on trust for sale and the conveyance provided that the husband and wife should be beneficially entitled as joint tenants to the proceeds of sale of the house and to the net rents and profits thereof until sale. The effect of this was to constitute a gift by the husband to the wife of a joint beneficial interest in the property. Later the marriage was dissolved on the petition of the husband and he applied to the court under section 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, on the footing that as the house was bought for the future benefit of both spouses the conveyance was a post-nuptial settlement for the purposes of the section. Denning J. acceded to the application and in the course of his judgment said that⁴⁴ "where a husband makes a continuing provision for the future needs of his wife, in her character as a wife, which is still continuing when the marriage is dissolved, the provision is a 'settlement' which can be brought before the court to see whether the provision should continue now that she has ceased to be a wife. The same applies to a provision by a wife for her husband or by each or either for both." The judge then stated that such provision usually takes the form of periodical payments but that it might take other forms; and proceeded⁴⁴: "The transfer of an investment into a wife's name, whether it be a house, or shares or an annuity, seems to me to be in its nature just as much a continuing provision for her future needs as is a periodical payment. The fact that it is made for no consideration other than natural affection and is in that sense a gift does not mean that it is not a 'settlement'."

In *Halpern v. Halpern*⁴⁵ a wife, for no stated consideration, conveyed a half share in a freehold property which belonged to her, but which was not the matrimonial home, to her husband. Subsequently the wife divorced the husband and applied for the deed of conveyance to be varied as constituting a post-nuptial settlement within the meaning of section 192 of the Judicature Act, 1925. Collingwood J., after reviewing the relevant authorities, came to the conclusion that the case came within the test laid down by Denning J. in *Smith v. Smith*.⁴⁶ At the end of his judgment the judge said⁴⁷: "The conveyance by the wife to the husband was for the purpose of making a provision for him, not, it is true, in respect of the matrimonial home, but

⁴⁴ 61 T.L.R. 331, 332.⁴⁵ [1951] P. 204.⁴⁶ 61 T.L.R. 331.⁴⁷ [1951] P. 204, 211.

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“ for the purpose of providing him with a ‘ house.’ I do not think that when Denning J. spoke of a ‘ house,’ that was restricted to the matrimonial home. It was, I think, a conveyance by the wife to the husband because he was her husband, and with a view to the continuance of the matrimonial relations between them; and it constituted a ‘ settlement ’ which can be brought before the court to decide whether the provision made by it should continue now that he has ceased to be her husband.”

In my opinion the decisions in *Smith v. Smith*⁴⁸ and *Halpern v. Halpern*⁴⁹ go further than is warranted by the decision of this court in *Hubbard (orse. Rogers) v. Hubbard*.⁵⁰ In my judgment the result of the decisions of this court in *Hubbard v. Hubbard*⁵⁰ and in *Bosworthick v. Bosworthick*⁵¹ is that no absolute disposition of property in favour of a spouse, whether made for consideration or not, and not being a provision in the nature of periodical payments, can be treated as a “ settlement ” for the purposes of section 25 of the Act; from which it follows, of course, that the property comprised in such a disposition is not “ property settled ” with reference to which an order under the section can be made.

Counsel for Lady Prescott sought to escape from this conclusion in the present case by suggesting that the securities were intended by both the spouses to be part and parcel of the total sum of £35,000 which was necessary to enable the husband to become a member of Lloyd’s. Perhaps a sufficient answer to this contention is that if the securities had been intended to form part of the £35,000 they would not have been transferred to the husband at all, for he never did become a member of Lloyd’s. But in any case it is just as clear on the face of the deed that the securities were to be passed into the sole beneficial ownership of the husband as it is that the £20,000, had it become payable, would have been a loan to the husband and nothing more.

I have not found it necessary to consider the respective merits of the parties in this case, for the question before us is purely one of law. I am, however, by no means prepared to accept a suggestion which I understood Mr. Gardiner to put forward on behalf of the appellant Fellowes to the effect that Lady Prescott had had a year of marriage and therefore got good value for the securities which she transferred to her husband. Married happiness cannot

⁴⁸ 61 T.L.R. 331.⁴⁹ [1951] P. 204.⁵⁰ [1901] P. 157.⁵¹ [1927] P. 64.

be assessed in terms of money; but I should have thought that £15,000 was a heavy price to pay for a year during which, as the evidence shows, the wife took second place to her fortune in the affections of her husband. It was indeed her resentment at this, and the resulting closing of her purse-strings, which seemed good and sufficient reason to the husband for taking himself elsewhere. I agree that the appeal should be allowed.

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SELLERS L.J. I agree; and I have nothing to add to the reasons of my Lords.

Appeal allowed.

Leave to appeal to House of Lords refused.

Solicitors: *P. R. Kimber for Norman Caney, Putney; Culross & Co.*

M. M. H.

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10. — Maintenance — High Court — Committal order — Indorsement — Suspension on terms—Further default by judgment debtor—Committal order to issue indorsed for amount of original debt only — Matrimonial Causes (Judgment Summons) Rules, 1952 (S.I. 1952, No. 2209/L.21), r. 6 (3).

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